Supreme Court of the United States

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No. 397.

BRIEF FOR APPELLANT.

LLOYD W. BOWERS,
[illegible]

D. E. BUTTERFIELD,
[illegible]

J. C. ANGELL,
HENRY RUSSEL,
ASHLEY POND,
BENTON HANCHETT,
[illegible]

[illegible]

Supreme Court of the United States.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
Appellant,
v.
PERRY F. POWERS, Auditor General of the State of Michigan,
Respondent.

BRIEF FOR APPELLANT.

This is an appeal from final decree of the Circuit Court of the United States for the Western District of Michigan, Southern Division, dismissing appellant's bill. Like appeals from the same court in twenty-six similar suits are before this court; which has ordered that all the appeals be heard together.

The suits were brought to restrain respondent, who is Auditor General of Michigan, from enforcing against complainants the provisions of Act No. 173 of the Michigan Laws of 1901, entitled "An Act to provide for

the assessment of the property of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight line companies; and for the levy of taxes thereon by a State Board of Assessors, and for the collection of such taxes." The taxes involved in the litigation are those for 1902, resulting from the first assessment under the statute. (Sec. 17.)

The act provides for taxation of the property of the corporations to which it applies by the following method:

(a) The corporate property is to be assessed by the members of the board of state tax commissioners, who for the purposes of action under Act 173 are created a new board, known as the "State Board of Assessors." (Sections 1, 4, 5, 8, 9, 10.) The assessment is required to be at the property's "true cash value on the second Monday of April of the year in which the assessment is made." (Sec. 8.)

(b) The new and peculiar feature of the statute lies in the application to corporate property of a special rate of tax, known as the "average-rate"; which is derived by the following process: The total *ad valorem* taxes for all purposes, state, county, city, township, village and school district, paid by property in Michigan which is taxed otherwise than under Act 173, are divided by the total assessments of such property, whether made by one or another assessor, and the quotient resulting from this process of division is the rate of tax applied to corporate property under Act 173. (Sections 12 and 13.) Attention is called at

once to the fact that the property of a corporation situated in a particular part of Michigan, however restricted, is, therefore, taxed at a rate which is made to depend upon the amount of taxes paid by property in all other parts of Michigan, not merely for state but also (and largely) for local purposes.

(c) The taxes collected from corporations under Act 173 are to "be applied in paying the interest upon the primary school, university and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt other than the amounts due to educational funds, when such taxes shall be added to and constitute a part of the primary school interest fund." (Sec. 16.)

(d) The taxes under Act 173 constitute a lien upon all the property of the taxed corporation, as well as a debt of the corporation to the state; "which lien and debt may be enforced by seizure or sale of said property, or such portion thereof as may be necessary to satisfy the same." A warrant is given by the State Board of Assessors to the Auditor General, commanding him to collect the tax; and it is provided that, "Said warrant shall authorize and command the Auditor General, in case any corporation named in the assessment roll shall neglect or refuse to pay its tax, to levy the same by distress and sale of the properties of said corporation, or such portion thereof as shall be necessary to raise sufficient money to satisfy such tax and the expense of such sale, after giving the same notice of such sale as provided for by the general laws of this state for the sale of property seized for taxes and offered for sale." (Sec. 13.)

A copy of Act 173 is attached to this brief as *Appendix A.*

More particular statement of its details will be made from time to time in this brief, as they may be pertinent.

Before the enactment of Act 173, the railroads of Michigan were taxed at a percentage of their gross earnings; and, if Act 173 is unconstitutional, the former statutes for gross earnings taxation remain in force. Complainants, before beginning their suits, paid to the state their full taxes under the gross earnings laws.

Act 173 of 1901 in all substantial respects is identical with a prior act—Act 168 of 1881—which required taxation of telegraph and telephone lines in Michigan upon the "average-rate" plan; and that statute was declared by the Supreme Court of Michigan to violate the requirement of the Michigan Constitution that "the legislature shall provide an uniform rule of taxation, except on property paying specific taxes." (Michigan Const., Art. XIV, Sec. 11.)

Pingree v. *Auditor General,* 120 Mich., 95.

After that decision—in 1900—the Constitution was amended in Art. XIV, Sections 10, 11 and 13, for the purpose of permitting the taxation of corporations by the average-rate method, which the Supreme Court had declared invalid. The altered sections, in both their original and their new form, are printed in *Appendix B* to this brief; and in the same appendix are printed also Sections 12 and 14 of the same article, which were left unaltered.

In computing the average-rate for 1902—that being their first action under Act 173—the State Board of Assessors considered that the assessments upon property generally in Michigan were far below its real value, and considered farther that they were entitled to put their own valuation upon property paying *ad valorem* taxes generally. They, therefore, adjudged the true cash value of property in Michigan paying *ad valorem* taxes otherwise than under Act 173 to be $1,715,000,000, though the actual assessments aggregated only $1,418,-251,858. Using their own valuation of general property as a divisor in computation of the average-rate, the State Board declared the rate to be $13.68905 per thousand dollars of assessed valuation, and levied that rate on railroad property. The Board of Education of the City of Detroit, however, applied to the Supreme Court of Michigan for a writ of mandamus to require the State Board of Assessors to redetermine the average-rate, by using for such determination the aggregate of the actual assessments upon property in Michigan; and the Supreme Court awarded the mandamus, holding that under the provisions of Act 173 the State Board of Assessors had no authority to equalize in any manner the taxation of corporate property under Act 173 with the taxation of other property in Michigan paying *ad valorem* taxes, but was bound to accept for computation of the average-rate the assessments as actually made by the local assessors.

Board of Education of Detroit v. *State Board of Assessors,* 133 Mich., 116.

The validity of Act 173, however, was not at all considered by the Michigan Supreme Court; for the ob-

vious reason that both parties to the litigation claimed it to be valid—the relator asking its enforcement, and the defendants having no authority or official existence save under that act. The controversy in the case just cited was solely over the statute's interpretation.

After the decision concerning the way in which the average-rate was to be computed, the State Board made a recomputation; using this time the value of the general property in Michigan as actually assessed by the general assessors; with the result of an average-rate of $16.55329 per thousand dollars of assessed value, which was applied to all railroad property and determined the taxes in controversy.

It is admitted that the matter in dispute in each of the cases before the court exceeds the sum of two thousand dollars, exclusive of interest and costs.

Assignments of Error.

These are in all the cases practically identical with the assignment in the Michigan Central Company's case, which is found on pages 855 to 858 of the Michigan Central Record. Their essence is contained in the following selected portions, which are quoted:

"1. Act No. 173 of the public acts of Michigan of 1901, approved May 27th, 1901, deprives complainant of its property without due process of law, in contravention of article XIV of the amendments to the Constitution of the United States.

2. Act No. 173 of the public acts of Michigan of 1901, approved May 27th, 1901, denies to complainant the equal protection of the laws, in contravention of article XIV of the amendments to the Constitution of the United States.

6. Said act No. 173 of the Michigan public acts of 1901, if enforced, would take complainant's property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States, for the following several reasons, each of which is separately assigned as ground upon which the decree of the circuit court dismissing the complainant's bill should be reversed, viz.:

(a) Due process of law requires in taxation that the tax be levied by a legislative body which is chosen by and acts for the community that includes the person or contains the property taxed and receives the tax.

(b) The tax under such act is not imposed by the state legislature, but by the local legislatures of counties, towns, cities, villages and school districts in Michigan which do not represent complainant as to its property beyond the jurisdiction of such local legislatures.

(c) The moneys demanded from the complainant are not taxes at all but arbitrary and forced contributions to the state so that their exaction would be taking of private property for public use without compensation.

(d) Due process of law requires a hearing of the taxpayer upon the amount of his tax, and this right of hearing extends to the amount or rate of tax as well as to the assessment or value upon which the tax must be made.

7. Said act No. 173 of the Michigan public acts of 1901, if enforced, would deny to complainant the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States for the following several reasons, each of which is separately assigned as ground upon which the decree of the circuit court dismissing the complainant's bill should be reversed, viz.:

(a) While all others in Michigan are given the benefit and protection of having the amount of their taxes fixed by a representative legislature, that fundamental protection is denied complainant.

(b) Complainant's taxes are fixed in large part by

executive officers, while other taxes in Michigan have their amount determined legislatively.

(c) Other taxes in Michigan are fixed with reference to and in such amount as is deemed necessary to meet the needs of the community that pays the taxes and is to receive them, but complainant's taxes are fixed without reference to the needed revenue of the state which receives them.

(d) Complainant is denied the protection of such legislative restraint upon the consequences to it of erroneous assessments throughout the state as is afforded by Michigan legislation to all others.

(e) Complainant is denied such privilege of hearing concerning the amount of its taxes as the Michigan laws grant to all others.

(f) All taxpayers other than those of the class to which complainant belongs pay taxes founded upon the expenses of the state government and of the local governments whose benefits they enjoy and upon the private investments of the local communities to which they belong, while complainant is taxed because of the expenses of governments whose benefits it does not share and of private local investments in whose ownership and use it does not participate.

(g) Equalization of assessments is denied to complainant, while it is accorded to taxpayers of all other classes in Michigan.

(h) Debts are deducted from credits in the assessment of the property of all other classes of taxpayers in Michigan, while no such deduction is made in the assessment of the property of the complainant.

(i) Personal property of the complainant not used in its railroad business is taxed after the average-rate plan under said act, though there can be no justification for taxing it otherwise than like personal property of other taxpayers.

(j) Complainant's credits not used in or incident to its business are taxed under said act, though there can be no constitutional propriety in treating such credits under another plan of taxation than is applied to credits generally.

(k) Said act applies only to property owned by corporations and does not apply to property of the same kinds and used in the same kinds of business when owned by a natural person.

(l) The corporations enumerated in said act are arbitrarily and unreasonably separated for taxation from other corporations of essentially the same character.

(m) Complainant is denied the protection of article XIV, section 14, of the Michigan constitution which, for the benefit of all but taxpayers of the class of which complainant is one, requires that 'every law which imposes, continues or revives a tax, shall distinctly state the tax and the objects to which it is to be applied'; and further that 'it shall not be sufficient to refer to any other law to fix such tax or object.'

8. The constitution of Michigan, as amended by the change of sections 10, 11 and 13 of article XIV, made at the general election held in November, 1900, still requires uniformity in the assessment of all property subjected to *ad valorem* taxes; and act No. 173 of the Michigan public acts of 1901 contravenes the constitution of Michigan in that debts are not deducted from credits under said act, though debts are deducted from credits in the assessment for taxation of other property than that taxed under said act No. 173; and so the assessment of property for taxation under said act No. 173 is not uniform with the assessment of other property in Michigan taxed *ad valorem*. Such lack of uniformity in the assessment of property under act No. 173 and the assessment of other property violates sections 10 and 11 of article XIV of the constition of Michigan, as amended in 1900.

9. The assessment of complainant's property under act No. 173 of the Michigan public acts of 1901, without deduction of debts from credits, while under the laws of Michigan debts were deducted from credits in the assessment of the property of others, for *ad valorem* taxation under the laws of Michigan, violates the requirement of uniform assessment of property subjected to *ad valorem* taxation made by the Michigan constitution.

10. The assessment of complainant's property under act No. 173 of the Michigan public acts of 1901, without deduction of debts from credits, violated section 12 of article XIV of the Michigan constitution requiring all assessments on property to be at its cash value.

11. The assessment of complainant's property under act No. 173 of the Michigan public acts of 1901 violated the provision of section 10 of article XIV of the Michigan constitution, as amended at the election held in November, 1900, requiring property of corporations assessed by the state board of assessors to be assessed at its true cash value.

12. The assessment of complainant's property, upon which is founded the tax involved in this suit, was made at the property's true cash value. The rate imposed upon the property of complainant by the proceedings in question in this case was the average-rate paid upon property in the state, other than that taxed under said act No. 173 of the Michigan public acts of 1901, upon which *ad valorem* taxes were assessed for state, county, school and municipal purposes. The evidence shows that such other property was uniformly, intentionally and generally assessed at the time in question at not more than eighty-two + per cent. (82 + %) of its true cash value; and seventeen + per cent. (17 + %) of the tax in question, therefore, should at its true value.

The *questions* to be presented to the court fall into three groups:

First. Under the Federal Constitution—whether Act 173 violates the provisions of the fourteenth amendment regarding due process of law or the equal protection of the laws.

Second. Under the State Constitution, in its amended form,—whether Act 173 violates the requirement of uniform assessment of all property taxed *ad*

valorem (which is claimed by appellant to remain in the constitution notwithstanding the "average-rate" amendments of 1900), by reason of the fact that deduction of debts from credits is allowed by the statutes of Michigan to all persons except those taxed under Act 173, while that act does not permit such deduction to the corporations assessed under it.

Third. Under both the Federal and the State Constitutions—whether, even if Act 173 be valid, the railroad taxes of 1902, involved in these suits, are invalid, because,—

(1) The assessment of railroad property was actually made without allowing any deduction of debts from credits, while such allowance was made in the assessment of all other property taxed *ad valorem* in Michigan.

(2) The assessment of railroad property was made by the State Board, designedly, at full value, while the assessments of other property in the state taxed *ad valorem* were made by the ordinary assessors, systematically and designedly, at not over eighty-two per cent. of its full value.

The last question (regarding the effect upon the taxes in suit of the systematic under-assessment of other property) is treated in a separate brief on that subject alone, as it is chiefly a question of fact and requires consideration of extensive evidence. All other questions, being those of law unmixed with fact, are considered in the brief submitted by Mr. Hanchett and in the following:

BRIEF.

FIRST. *Under the general head that the taxing method of Act* 173 *of the Michigan Laws of* 1901 *is not "due process of law," the following contentions will be made—growing out of the central fact that the statute makes the "average-rate" depend directly upon, and grow with, the local taxes of all the counties, cities, villages, towns and school districts of Michigan, including those where the taxed railroad has no office and no property.*

I. The tax is not founded upon, and measured by, a judgment or estimate by the state legislature of the revenue needed for the state government.

II. The tax is directly founded upon, and proportionate to, the expenses (partly governmental and partly proprietary) of local communities in which the taxpayer neither resides nor has property, and whose government and local enterprises, therefore, do not benefit the taxpayer.

III. The tax is laid for relief of the citizens of the various local governments of Michigan—counties, cities, towns, villages and school districts—from part of the expenses of those local governments, under many (and indeed most) of which the taxed railroad does not live and within whose jurisdiction it has no property.

IV. The distribution of the burden of the state's needed revenue among its different contributors is not

founded upon what the legislature considers a just relation between the taxes of those persons who live or have property under the same governments, but upon what the legislature thinks a just division between persons living in different parts of the state, under different local governments, of the expenses of all those governments.

V. The amount of state tax imposed upon the railroad taxpayer is not fixed by the state legislature itself; but the power of fixing that amount is delegated to the local legislatures of the state's various political subdivisions—counties, cities, towns, villages and school districts—in many of which the taxpayer has no office or property.

VI. The taxpayer is deprived of the right to be heard concerning the amount of his tax.

Before entering upon the particular development of these several points, enough should be said to show that such faults in the statute, if they be found to exist, are forbidden by the Federal Constitution.

There are features of taxation so planted in its very nature, so essential to prevent taxation from being a mere arbitrary exaction, that they are opposed to the very idea of any government by law.

"Tax legislation may be colorable merely, either because the purpose for which the tax is demanded is not a public purpose, *or because of the absence of some other essential element in taxation.* When that is the case, the judiciary is the efficient check, and it must protect individuals and protect the public against what,

in such a case, would be an attempt at *lawless exactions.*"

Cooley on Taxation (*3rd Ed.*), 50, *and cases there cited.*

"Great as is the power of any sovereignty to levy and collect taxes from its citizens, that power in a constitutional country has very distinct and positive limitations. Some of these inhere in its very nature, and exist, whether declared or not *declared, in the written constitution.*"

Ib., 83.

"Taxation is limited in its exercise by its own nature, characteristics and purposes."

In Matter of Washington St., 69 Pa. St., 352, 363.

"It has been forcibly and yet very truly said that an unlimited power in the legislature to make any and everything lawful *which it might see fit to call taxation,* would, when plainly stated, be an unlimited power to plunder the citizen."

Cooley on Taxation (*3rd Ed.*), 183.

Of the fundamental restrictions upon taxation, existing apart from the fourteenth amendment or other express constitutional provision, Justice Miller said:

"It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all

that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. *Topeka,* 20 Wall., 655, 662, 663.

In this case it was decided that taxes cannot be levied for a private purpose.

When elements, fundamental in the very conception of a tax, are absent, the charge is not a tax at all, but a form of confiscation.

Judson on Taxation, Secs. 340, 341, 392.

State Board of Tax Commissioners v. *Holliday,* 150 Ind., 216.

City of Lexington v. *McQuillan's Heirs,* 8 Dana (Ky.), 513, on pp. 517, 518.

Woodbridge v. *City of Detroit,* 8 Mich., 274, on page 301.

State v. *Township of Redington,* 36 N. J. Law, 66. 69, 70.

Such, indeed, is the effect of the decision in

Loan Association v. *Topeka,* 20 Wall., 655.

"Due process of law" certainly requires the preservation of all features of taxation which are necessary to its fundamental justice, or to its consistency with the nature of free institutions. An exact and full definition of the phrase has never been made, or even attempted, by the courts, but descriptions of it have been given that disclose its larger significance.

Mr. Justice Brown has said:

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that *there are certain immutable principles of justice which inhere in the very idea of free government* which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. What shall constitute due process was perhaps as well stated by Mr. Justice Curtiss in *Murray's Lessees* v. *Hoboken Land Co.,* 18 How., 272, 276, as anywhere. He said: 'The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, *we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their*

civil and political condition by having been acted on by them after the settlement of this country."

> *Holden* v. *Hardy,* 169 U. S., 366, on pages 389, 390.

Mr. Justice Matthews said:

"Due process of law in the latter (*i. e.,* the fifth amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, *exerted within the limits of those fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions, *and the greatest security for which resides in the right of the people to make their own laws,* and alter them at their pleasure.

* * * * *

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. *Law is something more than mere will exerted as an act of power.* It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transfering one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbi-

tary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the person and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

Hurtado v. *California,* 110 U. S., 516, on pages 535, 536.

In this same case, Mr. Justice Harlan said:

"My brethren concede that *there are principles of liberty and justice, lying at the foundation of our civil and political institutions, which no state can violate* consistently with that due process of law required by the fourteenth amendment in proceedings involving life, liberty or property. Some of these principles are enumerated in the opinion of the court. But, for reasons which do not impress my mind as satisfactory, they exclude from that enumeration the exemption from prosecution by information, for a public offense involving life. By what authority is that exclusion made? *Is it justified by the settled usages and modes of procedure existing under the common and statute law of England at the emigration of our ancestors, or at the foundation of our government?*" (Page 546.)

Mr. Justice Field said:

"That clause of the fourteenth amendment is found, in almost identical language, in the several state constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in *Davidson* v. *New Orleans,* to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S., 97, 104. It is sufficient to observe here, that by 'due process' is meant one which, following the forms of

law, is *appropriate to the case,* and *just to the parties* to be affected. *It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained;* and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that *there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. Hurtado* v. *California,* 110 U. S., 516, 536."

Hagar v. *Reclamation District,* 111 U. S., 701, on pages 707, 708.

See, also,

Mr. Webster's argument in Dartmouth College case, 4 Wheat., 518, 581.

Cooley on Constitutional Limitations, *355.

Johnson, J., in 4 Wheat., 235, 244.

Guthrie on Fourteenth Amendment, 66, 67 (*and notes*).

Story on the Constitution (*5th Ed.*), Sec. 1945.

Judson on Taxation, Secs. 318, 340, 343 and 431.

The course of history and long established usage are of large importance in ascertaining what is due process.

Murray v. *Hoboken Land Co.,* 18 How., 272, 276.

Weimer v. *Bunbury,* 30 Mich., 201, 213, 214.

Bell's Gap R. R. v. *Pennsylvania,* 134 U. S., 232, 237.

In deference, then, to the principles of fundamental justice, to the history and general usages of the American people, and to the fundamental ideas of government under free institutions, can it be questioned whether "due process of law" permits unlimited taxes, without restraint by consideration of the needs of government; or whether it permits that the taxes of those who live under one government be measured by the expenses of other governments; or whether it permits persons or property to be taxed for the relief of others from the expenses of governments under which the taxpayers neither reside nor have property; or whether it permits the amount of a tax to be determined by any other legislature than that of the community to which the taxpayer belongs; or whether it permits the amount of a tax to be fixed without the taxpayer's being accorded the privilege of hearing?

That *such* things are essential to due process of law, in the field of taxation, hardly needs argument; and I shall only call attention to certain decisions of immediate pertinency.

The taking of property by a state for private use (even with compensation) is not due process of law.

> *Mo. Pac. Ry. Co.* v. *Nebraska,* 164 U. S., 403.
> Judson on Taxation, Sections 346-350.
> *Id.,* Sec. 391.

The taking of property even for public use without compensation is not due process.

> *C., B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 226, 241.
> *Scott* v. *Toledo,* 36 Fed., 385.
> Guthrie on Fourteenth Amendment, 93.

The attempt by a government to tax property beyond its jurisdiction is not due process.

Louisville Ferry Co. v. *Kentucky,* 188 U. S., 385.

D., L. & W. R. R. Co. v. *Pennsylvania,* 198 U. S., 341.

Due process requires that the taxpayer be given opportunity for hearing concerning the amount of his tax.

Hagar v. *Reclamation District,* 111 U. S., 701, 710.

Winona & St. Peter Land Co. v. *Minnesota,* 159 U. S., 526, 535.

D., L. & W. R. R. Co. v. *Pennsylvania,* 198 U. S., 341.

Undue interference with liberty of contract is not due process of law.

Allgeyer v. *Louisiana,* 165 U. S., 578, 589.

"Under the Fourteenth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice."

Mr. Justice Brown, in *Turpin* v. *Lemon,* 187 U. S., 51, on p. 60.

The Fourteenth Amendment controls the action of all branches of government,—legislative, executive and judicial.

Blake v. *McClung,* 172 U. S., 239, 260.

C., B. & Q. R. R. Co. v. *Chicago,* 166 U. S., 226, 233.

Scott v. *McNeill,* 154 U. S., 34, 45.
Yick Wo v. *Hopkins,* 118 U. S., 356, 373.
Ex parte Virginia, 100 U. S., 339, 346, 347.

With particular reference to the point that due process of law requires taxes to be laid by a representative legislature,—*i. e.,* by a legislature which is chosen by the community to which the person or property taxed belongs; which acts in the interest of that community; and which is responsible to the taxpayers —these further considerations and authorities are of special value:

(1) Chief Justice Marshall said:

"The only security against the abuse of this power (*i. e.,* taxation) is found *in the structure of government* itself. In imposing a tax *the legislature acts upon its constituents.* This is in general a sufficient security against erroneous and oppressive taxation."

McCulloch v. *Maryland,* 4 Wheat., 427.

This language contemplates a representative legislature as fundamental in our plan of government. At another time Chief Justice Marshall said:

"The interest, wisdom and justice of the *representative* body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally."

Providence Bank v. *Billings,* 4 Pet., 514, on page 563.

See, too,

Wilcox v. *Paddock,* 65 Mich., 23, on pages 28 and 29.

People v. *Hurlbut,* 24 Mich., 44; *especially the*

language of Judge Christiancy on pages 64-66, *Chief Justice Campbell on page* 89, *and Judge Cooley on pages* 97-110.

Board of Park Com'rs. v. *Detroit,* 28 Mich., 227, on pages 244, 245, 247, 249 and 250.

Board of Com'rs v. *Abbott,* 34 Pac. Rep., 416 (Kas.).

Schultes v. *Eberly,* 82 Ala., 242—*especially on page* 246.

Parks v. *Board of Com'rs,* 61 Fed., 436.

Harward v. *St. Clair Drainage Co.,* 51 Ill., 130, 134-136.

United States v. *New Orleans,* 98 U. S., 381, 392.

Thompson v. *Allen County,* 115 U. S., 550, 555.

City of Lexington v. *McQuillan's Heirs,* 8 Dana (Ky.), 513, 517, 518.

This court said in *United States* v. *New Orleans:* "The position that the power of taxation belongs exclusively to the legislative branch of the government no one will controvert. Under our system it is lodged nowhere else." (p. 392.)

It was said in *Parks* v. *Board of Commissioners:* "Does the Constitution of the State of Kansas authorize the legislature to delegate the power of taxation either to the signers of these petitions or to these road commissioners? Can a tax be arbitrarily forced upon the taxpayers of a county, either by individuals or by officials in whose appointment they have no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It

appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism. Hence, in all free governments, the power to tax must be limited to the necessities for the purposes of government, and the agencies for local taxation should be fixed and their powers limited by organic law, and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed. If they act corruptly, those directly interested may then remove them, and appoint others. If those directly interested have no voice in their appointment, or power to remove them, they have no means of correcting their abuses. No other rule can secure those to be taxed from oppression and fraud on the part of the taxing officers." (pp. 437, 438.)

In *Harward* v. *St. Clair Drainage Co.*, the Illinois Supreme Court said:

"The power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people, and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No persons or class of persons can be safely entrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be protessedly exercised for public uses, by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority, of any kind, by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution." (p. 135.)

(2). "Representation and taxation go together."

This historic principle is the very reason for requirement of legislative imposition of a tax. The principle is that the people are to tax themselves; which they do when the taxes are voted by persons chosen as legislators by the community that pays the tax.

Cooley on Taxation (*3rd Ed.*), 95-98.

So solicitously is representative taxation insisted upon in American government that in the United States constitution revenue measures are required to be originated in the more popular branch of Congress, the House of Representatives. The same constitutional provision exists in many of the states.

The legislature cannot authorize a municipal corporation to tax lands beyond the corporate limits.

Wells v. *City of Weston*, 22 Mo., 384.

This decision is founded upon the view that, even if it were admitted that the legislature itself could levy such a tax for the benefit of the municipality, it could not delegate such power of taxation to officials of the city, inasmuch as they do not represent or act for the persons or property taxed. The court argued that the case was not within the recognized power of authorizing municipalities to tax themselves.

The admitted principle that a legislature cannot tax property beyond its jurisdiction is only another statement of the rule that property can be taxed only by the legislature of the community within which the property is situated. (*Judson on Taxation, Chap. XIV.*)

(3) The fundamental theory on which municipal corporations are allowed to be created is representative self-government. The grant by the state legis-

lature of legislative power, including that of taxation, to such bodies is a historical and recognized exception to the rule against delegation of legislative power, and is upheld only because it is strictly and entirely within the principle of representative government and, indeed, is a more immediate and complete application of that principle.

Cooley on Taxation (*3rd Ed.*), 101.

(4) It is fundamental, too, that taxation must be for the purposes of the very community that lays the tax.

Cooley on Taxation, Chap. V.
Id., page 187.
Judson on Taxation, Sec. 354.

This rule rests not only on the idea that persons shall be required to pay no taxes but those whose benefit they share, but equally on the idea that the legislature of any community is empowered by the members of the community to tax only for its own purposes, and, therefore, if the legislature attempts to tax for other purposes it goes beyond its authority and the tax is one not consented to or determined by the people themselves.

It thus appears that a tax must be levied by the legislature, not only of the political body whose members or property is taxed, but also of that political body whose members receive the benefit of the tax. *The people must tax themselves for their own benefit.*

(5) The rule that taxes must be for public, and not private, purposes rests upon the same foundation

of representative legislation. The people do not tax themselves when a tax is laid by the legislature for a private purpose, because they have not authorized their legislative representatives to act on other than public matters or for other than public purposes.

(6) By article IV, section 4, of the constitution "the United States shall guarantee to every state in this union a republican form of government." While perhaps this provision does not furnish a ground of direct attack by individual taxpayers upon legislation which gives the power of taxing them to others than a representative legislature (because the constitutional guaranty runs to the state itself, and also because it is considereld to be directed rather to Congress than to the courts); yet, it puts beyond question the fact that the Federal Constitution contemplates a system of representative government in the states, for republican government is representative government. Legislation by persons who are not members of the legislature that represents the community subjected to the legislation is certainly not "republican government." If, then, a tax is laid without the authority of a legislature representative of the community that pays the tax, that certainly is shown by the analogy of the section guaranteeing a republican form of government not to be due process of law; for features so fundamental in the conception of taxation as to be necessary to a republican form of government are certainly essential to due process of law.

(7) Due process of law requires, in judicial proceedings, a court having jurisdiction over the subject-matter and also over the person or property to be affected by the judgment.

Pennoyer v. *Neff*, 95 U. S., 714, 733.

A court with jurisdiction is, in the judicial field, the exact analogue of a representative body, in legislative matters. How can the legislature of any community have more power, under the Federal Constitution, over persons not within its jurisdiction than a court can?

(8) The right of appeal to the courts for relief from action of the legislature which is claimed to violate private rights is requisite to due process of law; and, therefore, a statute which forbids it is unconstitutional.

C., M. & St. P. Ry. Co. v. *Minnesota,* 134 U. S., 418, 456, 457.

Is the privilege of being legislated for by the regular, representative, legislature of one's own community less essential to due process of law?

.We come now to direct consideration of the statute in hand:

I.

These so-called taxes are not founded upon, or measured by, the state's actual need of revenue, or a legislative estimate of it. They are rather the outgrowth of a legislative declaration that a railroad must pay, to the state, as much in proportion to the value of its property as other persons throughout the state pay, on the average, for both state and local purposes (*i. e.*, the expenses not only of the state, but of county, city, town, village and school district organizations), whether that amount of tax be what is needed by the state or not. There is *no reasonable, or real, relation* between the revenue which comes to the state under this statute, as a result of the amounts of tax levies made by local legislatures for local purposes, and the state's need of revenue.

In the imposition of any tax, there are two fundamental, and ever-present, questions for the legislature to decide: (1) How much revenue the state needs, and (2) what will be a just distribution (*i. e.*, "apportionment") of that amount among the several contributors of the tax. The first of these questions is the more fundamental; because its answer fixes the amount whose division limits the second question. The revenue that the state needs is independent of its distribution among different classes of taxpayers: but that distribution concerns, and should stop with, the needed revenue. This statute, however, will be found to subordinate the question of needed revenue to the purpose of seeking equality between railroad taxes (paid to the state) and the taxes of all others than railroads

for both state and local purposes (which, therefore, are founded upon, and measured by, the *local* needs of counties, cities, towns, villages and school districts). *The statute turns the general problem of taxation upside-down*—by making the apportionment of taxation generally, as between all citizens for all purposes, control the amount of the state's revenue.

Authority is hardly essential for the proposition that the power to tax for state purposes is limited by a fair legislative discretion as to the amount of revenue needed by the state. Otherwise, the legislature can take for the state everything its citizens have,—arbitrarily.

Justice Brewer has said:

"This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the *unnecessary* and uncompensated taking or destruction of any private property, legally acquired and legally held."

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362, on page 399.

It was said in *Schultes* v. *Eberly*, 82 Ala., 242, that:

"The legislative power conferred on the General Assembly is plenary, except as restrained by the federal and state constitutions, and by the rule that it must be legislative in character and purpose. Whoever asserts the unconstitutionality of a statute assumes the burden to show some constitutional prohibition violated, or some limitation exceeded. The prohibition or limitation need not be express; it is sufficient if such is the manifest implication from the

tenor and spirit of all the provisions relating to the subject-matter. The taxing power is legislative, and, being an incident of sovereignty, is only limited, as to the subjects and rates of taxation, in the absence of constitutional limitation, by public purposes and the *needs of the government.*" (p. 243.)

Constitutional limitations may be implied as well as express; and their implication may result either from the essential nature of government or from the general plan of the constitution.

Board of Comm'rs v. *Abbott*, 34 Pac. Rep., 416.

State v. *Barker*, 57 L. R. A., 244, 250.

And, indeed, the Michigan Constitution distinctly says:

"The legislature shall provide for an *annual tax; sufficient with other resources to pay the estimated expenses of the state government, the interest of the state debt and such deficiency as may occur in the resources.*"

Mich. Constitution, Art. XIV, Sec. 1.

It being undeniable that the legislature, in this statute of Michigan, has made the state's revenue depend upon, and vary directly with, the amounts of taxes raised, *from year to year*, by the several *local legislatures* of the various counties, cities, towns, villages, and school districts, for their *local* purposes, *the question in hand is whether the state tax so resulting can fairly be considered to be what the state legislature itself considers the amount of revenue needed by the state in each year.* The answer to that inquiry must depend upon the test whether it is a *reasonable* idea that the state's need of revenue is proportionate to

what the county boards, city councils, town boards, village boards, and school district boards throughout the state (over 1,000 in number) decide, in the aggregate, that they will raise in taxes for the purposes, not only of local government, but also (and largely) of local improvements and investments.

The reasonableness of creating such a relation is the test because the action of the legislature, in establishing the relation, is not conclusive upon its propriety; and legislatures, like all persons, must be taken to intend the natural (and not to seek unnatural) consequences of their acts. If, therefore, there is no reasonable, or fair, proportion between, or interdependence of, the revenue which the state needs and the revenue which the local legislatures of counties, cities, towns, villages and school districts, raise in a given year for their local governments and their local improvements, then the state legislature cannot be held to have intended that the amount of state tax depend upon, and be measured by, the state's need; but must have intended, rather, as said at the outset of this discussion, that the railroads pay taxes on a principle of supposed equalization of total tax burden between them and all other taxpayers, *whether or not the revenue so collected be adjusted to the state's need.*

The opinion in *People* v. *Fire Association of Philadelphia,* 92 N. Y., 311, finely illustrates the point that the legislature of Michigan, in imposing the "average-rate" of tax, cannot be supposed to have considered and determined that such tax will yield an amount of revenue proportioned to the state's need of revenue, unless it is *reasonable* to estimate the revenue which

the state needs by the revenues which the counties, cities, towns, villages and school districts of Michigan raise for their purely local purposes. In that case the court held a statute valid which imposed upon a foreign insurance company a license fee in New York equal to the license fee imposed upon New York Companies by the state incorporating the foreign company. The first thing to be noted of the case is, obviously, that the state had the right to exclude the foreign corporations wholly from business within its boundaries, and, therefore, had the right to impose such conditions as it would upon their coming into the state. (See pages 324-327.) Beyond that, however, the court held that it was a reasonable thing to seek a parity of business conditions and opportunities for New York Companies and foreign companies in the different states. The opinion recognizes fully that any law is invalid whose operation is made to depend upon a fact or condition which has no reasonable connection with the purpose of the statute. Thus, Judge Finch says:

"But it is said the doctrine thus asserted (*i. e.*, that the law of one jurisdiction may be made to depend upon the enactments of another) would permit one State to adopt the law of another State together with its future changes by one sweeping enactment; and, for an example, that New York might enact that the rate of interest here for the loan of money should be such and the same as that which should be from time to time prescribed by the law of Maine. These are seeming, but in reality false analogies. They are pure cases of an abdication of its functions by the legislature and of an unwarranted delegation of its authority. *But that is so because there is no dependent or causative connection* between the domestic and the foreign law, as was said in *State* v. *Parker* (26 Vt., 365); and be-

cause, as was explained in *Barto* v. *Himrod* (8 N. Y., 483), the event upon which the law is made to take effect is not one on which the expediency of the law in the judgment of the law-makers depends. *In other words, no legislative judgment is involved.*" (p. 322.)

Speaking of the same illustrative case, and differentiating it from the case in hand, Judge Finch further said:

"There is thus developed the clear and wide difference between the two laws. One has merits of its own; the other has none. The expediency of one is debatable; that of the other is not. The one is enacted *because* of the foreign law; the other only *according* to the foreign law. The one is passed for legislative reasons and out of a legislative discretion which the foreign law and its possible mutations engender; the other without any such reasons and with no reason whatever, but only through trust in a foreign reason." (p. 323.)

The reference to *State* v. *Parker,* 26 Vt., 365, made by Judge Finch, is as follows:

"If the operation of a law may fairly be made to depend upon a future contingency, then it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, *and so far connected with the object of the statute as not to be a mere idle and arbitrary one.*" (Page 320 of Judge Finch's opinion.)

Here, then, is the question: Is the connection, which Act 173 establishes, between the amount of the state's revenue and the amounts of taxes raised by the local legislatures of the counties, cities, towns, villages and school districts in Michigan, for their local purposes, more than "an idle and arbitrary one?" *Is there a reasonable connection between them?*

The right and duty of this court to consider the real tendency of the taxing process prescribed by the statute in hand, with reference to the question whether it establishes a reasonable connection between state tax and the state's need of revenue, is amply sustained by cases already decided; and some of them are cited here. The same duty of judicial pronouncement of the real character and operation of a statute (whatever name it may bear, or superficial character it may wear) will be appealed to frequently in other branches of this brief.

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action."

Brewer, J., in

G. C. & S. F. Ry. v. *Ellis*, 165 U. S., 150, on page 154.

"That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the

board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. *They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.* So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus,* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

Matthews, J., in

Yick Wo v. *Hopkins,* 118 U. S., 356, on page 366.

See, also, the language of this admirable judge on pages 371 and 373 in the same case.

"The legislature of a state must be presumed to have acted from lawful motives, *unless the contrary appears upon the face of the statute.*"

Justice Gray in dissenting opinion in

G., C. & S. F. Ry. v. *Ellis,* 165 U. S., 150, on page 167.

The regulation of railroad rates is within the legislative discretion, just as fully as taxation; but that discretion must be reasonably exercised, just as in the case of taxation. The rule is that the determination of the legislature must be presumed to be just and must be upheld unless it clearly appears to the contrary.

> *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79, 91.

The federal courts are not bound, in considering questions under the Fourteenth Amendment even to accept the views concerning the nature or effect of a state statute that may have been taken by the state courts.

> *Yick Wo* v. *Hopkins*, 118 U. S., 356, 366.
> *A., T. & S. F. R. R.* v. *Matthews*, 174 U. S., 96, 100.

In illustration of the judicial power to pass upon questions concerning the real nature and operation of tax statutes, it is settled that courts may consider independently whether the purpose of the so-called tax is really public, even if the legislature has declared it in terms to be public; whether property sought to be taxed is really within the legislature's jurisdiction, even if the legislature has pronounced it to be; whether a tax is really uniform (when the state constitution requires it to be uniform), even though the legislature by adopting it has given it presumptive propriety; and whether a thing called by the legislature a "tax" is really a tax at all, or rather a taking of private property for public purposes without compensation.

Said Mr. Justice Brown, in *Holden* v. *Hardy:*

"These employments (*i. e.*, underground mining), when too long pursued, the legislature has judged to be detrimental to the health of the employes, and *so long as there are reasonable grounds for believing that this is so* its decision upon this subject cannot be reviewed by the federal courts." (169 U. S., 366, on page 395.)

It was further said in the same case:

"The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class." (*Id.*, p. 398.)

Justice Harlan, in *L. S. & M. S. Ry. Co.* v. *Ohio*, 173 U. S., 285, used (with reference to the question whether statutes are valid exercise of the police power, which is nothing else than the legislative power) the phrase, "*Having a real, substantial relation* to the public ends intended to be accomplished thereby." (page 299.) See, also, his language on pages 300 and 301 in the same case.

And, beside other valuable language, this court said through Mr. Justice Peckham, in *L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S., 684, of the Michigan statute requiring family thousand mile tickets:

"It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. *There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason.*" (page 699.)

See, also, pages 691, 693, 694 and 699.

See, also,

R. R. Co. v. *Husen*, 95 U. S., 465, 473.

Dobbins v. *Los Angeles*, 26 Sup. Ct. Rep., part No. 1, 18, on page 20; and the cases there cited.

By the pertinent test, viz.: whether the state's need of revenue can *reasonably* be judged by, and the state's revenue made to depend upon, the action of all the local legislatures in the state, in raising local taxes for local purposes of government and improvement, the statute in hand must fall;—

1. The Michigan Supreme Court itself decided, concerning the statute known as the "Atkinson Law" (which was identical in its plan with Act 173, and the overthrow of which by the state court led to the amendment of the Michigan Constitution) that just such an average-rate tax as here involved does not "bear a proportion to the amount to be raised" for the state. The court said:

"We must infer that this is a state tax, for it is payable to the state treasurer, and the law does not provide for its application to local purposes. *The taxes generally assessed for the state bear a proportion to the amount to be raised*, and all taxable property, except that paying specific taxes, is charged with a given and equal per centum upon its assessed value. That cannot be said of this property, for the rate is to be the average of all taxes raised for all purposes,—local as well as state."

Pingree v. *Auditor General*, 120 Mich., 95, on page 102.

2. Instead of its being true that, the more taxes the counties, cities, villages, towns and school dis-

tricts raise and spend for purposes of government, the more revenue the state needs to have, the exact reverse seems true. To the extent that the local communities in the state do the work of government, the state does not have it to do; and its own need of revenue should, therefore, be less.

3. The local taxes, however, in proportion to which complainants are taxed are not merely for governmental purposes, but *are largely for purposes that may be described as proprietary.*

Local taxes of the latter kind are such as are raised for purposes like the establishment or maintenance of parks; the establishment or maintenance of public baths; the establishment or maintenance of municipal gas works; the establishment or maintenance of municipal water works; the establishment or maintenance of municipal fire departments; and other like purposes. Decided cases, in the greatest abundance, establish that municipal operations of such kinds are not governmental, but purely private and proprietary. The completeness and fundamental character of the difference between taxes for such purposes and taxes for truly governmental purposes may be illustrated by three of its important consequences.

(a) The state legislature cannot impose taxes upon municipal corporations for their private purposes, though it may taxes for their governmental purposes.

Board of Park Com'rs. v. *Detroit*, 28 Mich., 228, 236, 237, 241, 242.

Davock v. *Moore*, 105 Mich., 120.

Cook Farm Co. v. *Detroit*, 124 Mich., 426.

Biades v. *Board of Water Com'rs.*, 122 Mich., 366, 389.

Hasbrook v. *Milwaukee*, 13 Wis., 37.

Mills v. *Charlton*, 29 Wis., 413.

People v. *Mayor*, 51 Ill., 17.

Gage v. *Graham*, 57 Ill., 144.

Wider v. *East St. Louis*, 55 Ill., 133.

State of Wisconsin v. *Haben*, 22 Wis., 660.

2 *Smith on Municipal Corporations*, Sec. 1476, p. 1531.

Cooley's Constitutional Limitations, pp. 284, 285 (using identical language with the last preceding work).

(b) Municipalities may bind themselves by contract with private companies authorizing the latter to do exclusively for the municipalities, and even exclusively of the municipality, such work as meets only the private, as distinguished from the governmental, needs of the community.

Illinois Trust & Savings Bank v. *Arkansas City*, 76 Fed., 271, 282.

New Orleans Gas Light Co. v. *New Orleans*, 42 La. Ann., 188.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

City R. Co. v. *Citizens R. Co.*, 166 U. S., 557.

New Orleans Water Works v. *New Orleans*, 120 U. S., 64.

New Orleans Water Works v. *Rivers*, 115 U. S., 674.

Little Falls E. & W. Co. v. *Little Falls*, 102 Fed., 663.

Cunningham v. *Cleveland*, 98 Fed., 657.

Los Angeles Water Co. v. *City*, 88 Fed., 720.

Bartholomew v. *Austin*, 85 Fed., 359.

Ludington Water Supply Co. v. *Ludington,* 119 Mich., 480.

Adrian Water Works v. *Adrian,* 64 Mich., 584.

Atlantic Water Works v. *Atlantic City,* 39 N. J. E., 367.

Newport v. *Newport Light Co.,* 84 Ky., 166.

State v. *Orr,* 68 Conn., 101.

Indianapolis v. *Gas Light Co.,* 66 Ind., 396.

Water Works Co. v. *Atlantic City* (N. J.), 6 Atl. Rep., 24.

(c) The state cannot appropriate to itself, without compensation, the property obtained by a municipality with taxes raised and used for its non-governmental purposes—even upon dissolution of the municipality.

Board of Park Com'rs v. *Detroit,* 28 Mich., 228, 240, 241.

State of Wisconsin v. *Haben,* 22 Wis., 660.

State ex rel. White v. *Barker,* 57 L. R. A., 244, 250, 251.

Meriwether v. *Garrett,* 102 U. S., 472.

Dubuque v. *Ill. Cent. R. Co.,* 39 Iowa., 56, 63-68.

Grogan v. *San Francisco,* 18 Cal., 590.

Spaulding v. *Andover,* 54 N. H., 38.

Town of Milwaukee v. *City of Milwaukee,* 12 Wis., 93.

The Michigan law, on this point, is fully stated by Judge Cooley:

"Municipal corporations, considered as communities endowed with peculiar functions for the benefit

of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as *private,* in contradiction to those in which the state is concerned, and which are called *public;* thus putting these corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations. This distinction is very carefully drawn in *Bailey* v. *New York,* 3 Hill, 531, which concerned the New York Water Works, and also in *Small* v. *Danville,* 51 Me., 362; *Philadelphia* v. *Fox,* 64 Penn. St., 180; and *Western College* v. *Cleveland,* 12 Ohio, N. S., 375. It is well stated by Lewis, Ch. J., in *Western Saving Fund Society* v. *Philadelphia,* 31 Penn. St., 183, in speaking of a municipal corporation as the owner of gas works: 'The supply of gas light,' he says, 'is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals, or private corporations, and in very many instances they are accomplished by these means. If this power is granted to a borough or a city, it is a *special private franchise,* made as well for the *private* emolument and advantage of the city as for the public good. *The whole investment is the private property of the city; as much so as the lands and houses belonging to it.* Blending the two powers in one grant does not destroy the clear and well settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a pri-

vate company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

> *Board of Park Commissioners* v. *Common Council of Detroit,* 28 Mich., 228, on pages 238, 239.

And, again:

"In the *People* v. *The Common Council of Detroit,* 28 Mich., 228, the nature of the ownership which municipal corporations have in their parks and commons was considered, and was declared to be, analogous to the ownership of private persons."

> *Attorney General* v. *Burrell,* 31 Mich., 34.

The same view is stated in numerous decisions of the Michigan Supreme Court:

> *Mayor* v. *Park Commissioners,* 44 Mich., 602, 604.
>
> *Adrian Water Works* v. *Adrian,* 64 Mich., 584.
>
> *Davock* v. *Moore,* 105 Mich., 120.
>
> *Blades* v. *Board of Water Commissioners,* 122 Mich., 366.
>
> *Cook Farm Co.* v. *Detroit,* 124 Mich., 426.

How can it be said that the state's need of revenue is proportionate to the *private investments* of the various local communities in the state? *As well might the legislature say that complainant's tax should be determined by inclusion in the average-rate process of all amounts spent by strictly private gas companies, water companies, street railway companies, etc., for their plants in the state.* Let it be remembered that the municipal gas plants, water plants, street railway

plants, etc., are not treated by this statute of Michigan as property to be taxed; but their cost (as met by taxes) is taken as showing a proportionate increase in the amount of revenue needed by the state. The like investments of purely private companies might better than municipal investments of a private kind be made to measure the state's proper revenue, because they may be new property in the state (brought there from other states for the investment) while taxes for municipal investments cannot be inferred to represent an increase of property in the state, being imposed upon persons and already-existing property within the state.

4. The tax levies of the various local communities are, in their true nature, expressions of the *opinions* of the local legislators *as to what local governmental needs and local policies of convenience and improvement make it wise to spend.* In that character they agree with most, if not all, exercises of legislative power, which are the outcome and declaration of the legislature's opinion of public policy. And, in deciding what amount of local taxes shall be raised, the local legislators consider local conditions and local policies solely; they do not, and cannot, look beyond. For illustration, in determining whether to establish a city fire department or health department, the city council passes upon a pure question of policy, and its decision is the legislative judgment on the question of policy. So, too (in the field of its proprietary operations), when a city council decides to establish water works, or gas works, or a public library, or a city park, it passes on, and its decision expresses, its opinion upon the question whether that is a wise policy

for the inhabitants of the city. It is not determining a fact, but fixing a policy. *How can the collective action of the numerous local legislatures, in determining local policies—partly governmental, but also largely private and proprietary—and fixing local taxes in aid of those policies, be said to afford any reasonable test, or measure, of the revenue which the state needs for its own purposes,*—when that action is expressive only of the judgment of those local legislatures upon what it is wise or profitable for their respective communities to do, in the two very different fields of local government (in the strict sense) and of local enterprise which is private to the local community and proprietary in its nature?

The *difference* between the statute of Michigan, under consideration, and ordinary taxation, lies (as respects the point immediately in hand), in three features:

(1) Tax statutes generally afford no indication of the basis on which the legislature determines the amount of the tax. They simply indicate a given rate or a given amount; and there is no way of telling how the legislature made up its mind. The presumption, therefore, obtains that the legislature judged in a proper way and upon reasonable grounds; and there is nothing to rebut that presumption. *Act* 173, *however, does affirmatively show just the basis on which the legislature has acted;* viz., the measurement of state taxes by the decisions of the legislatures of the various counties, cities, towns, villages and school districts throughout the state concerning their own local needs for local government and local enterprise.

(2) If the legislature orders a stated amount of tax

to be raised, it plainly says what revenue it considers the state to need. If, on the other hand, the legislature names the tax rate, that rate is applied to the prescribed subject of taxation (whether property, income, occupation or other thing), and the legislature again must be deemed to have decided that the stated rate, so applied to the subject of the tax, will yield no more than the state needs. *In such case,—the rate being definitely fixed by the legislature—the only thing that has to be judged, in order to estimate the amount of revenue, is the quantity or extent of the spbject of the tax (property, income, occupation, etc.); and that is a question of fact which the legislature can estimate as well as anybody, and has to estimate.* But, under this Michigan statute, an estimation of the quantity of property (viz., railroad property-value), which is the subject of the tax, will tell nothing of the amount of revenue that will result. The rate has first to be known; and that the legislature has not made definite. On the contrary,—

(3) The legislature cannot have estimated the rate of tax, in the usual and necessary way in which it estimates what amount of revenue will result from a tax rate which it names; because the latter problem requires only a judgment, as already said, upon the probable amount or extent of taxable property, income, occupation, etc.; which is always a question of fact,—future, rather than present fact, it is true—but still a question of fact, which can be reliably estimated, and is regularly estimated by all sorts of persons for all sorts of different purposes. The estimation of the average-rate, however, for any year, under this Michigan law, is not a question concerning what

the ordinary *facts* of community or business life will be and of the amount of revenue that will result from those facts through application of a stated and definite rate of tax; *but is a question of what other legislatures will do, in their independent discretionary power to adopt policies, partly governmental and partly proprietary, for their various jurisdictions.* And it should be recalled in this connection that those decisions of policy by other legislatures are not themselves concerning, or determined by, an estimate or consideration of facts merely, but are *decisions concerning questions of expediency,* about which on given facts different views might well be adopted. How can the state legislature reasonably be considered able to foretell such things? Nobody else can; and legislators are men.

What sound reason can be advanced why the state tax of Michigan could not as well be measured by, and made to depend on, the local taxes in the various counties, cities, towns, villages and school districts of Ohio, as upon the local taxes in the various local communities of Michigan itself? The local legislatures of the counties, cities, towns, villages and school districts of Michigan are as independent, in their legislative action, of the state legislature, as are the local legislatures in Ohio; their legislative decisions are upon questions of local policy as distinct from the state policy of Michigan, as are the enactments of Ohio's local legislatures; and, especially, their levies of local taxes for domestic enterprises such as water works, gas works, libraries, baths, parks, street railways, etc. —being (under the decisions of the Michigan Supreme Court itself) purely private enterprises—are unmis-

takably as unrelated to the question of what Michigan's state revenue should be as are the local taxes for like municipal enterprises, of a private character, in Ohio.

II.

The tax under this Michigan statute *is founded in large part upon the governmental expenses and proprietary outlays of local communities whose benefits the tax-paying railroad company does not share;* and so violates that most fundamental rule that the right of the state to tax rests upon the benefits which the state confers.

No one of appellant railroads is situated in all the counties of Michigan. Most of them are situated in a small part of the state. The Chicago & North-Western Railway Company, for example, has no railroad, or office, in Michigan outside of the "Upper Peninsula," and yet the average-rate of tax applied to its property depends upon, and increases with, the taxes raised in all the counties of the "Lower Peninsula" of Michigan, and in all the cities, towns, villages and school districts of those counties, for purely local purposes. If Detroit spends $10,000,000 for local government, the North-Western Railway Company has to pay proportionately more tax on its property in Northern Michigan than if Detroit's tax for local government were $5,000,000; and, beyond that, if Detroit spends $1,000,000 or $5,000,000 for purely domestic or private enterprises, such as gas works, water works, street railways, parks, baths, libraries, etc., the North-Western Railway's tax on its property

(though wholly outside of Detroit—in the "Upper Peninsula") is proportionately larger on that account.

It is unimportant, in this case, whether a railroad may be taxed more, as a whole, because of the expenses of local governments and of local enterprises in the counties, cities, villages and school districts where *some part* of the railroad is situated. The statute of Michigan does not stop with that. The average-rate of tax applied to the North-Western Railway is not derived by averaging all taxes (state and local) in the counties, cities, towns, villages and school districts, which the railroad enters; but by averaging all state and local taxes throughout the state. It may well be that (as respects the immediate point) the unity of railroad property would justify a statute requiring a railroad to pay taxes to the state at a rate derived by averaging the taxes, state and local, paid by others *in the same taxing jurisdiction;* but the question before the court is whether it can be made to pay a tax directly dependent upon, and measured by, the local taxes of counties, cities, towns, villages and school districts *where it has no part of its property and no office.* Such a plan operates to tax the railroad because of the expenses (public and private) of local communities whose benefits it does not enjoy.

1. The rule that taxes must be founded upon the expenses of a government whose benefits the taxpayer shares is plain, both in principle and on authority.

Sleight v. *People,* 74 Ill., 47, 49.
Allhands v. *People,* 82 Ill., 234.
Drake v. *Ogden,* 128 Ill., 603, 611, 612.

Town of Belle Point v. *Pence*, 17 S. W. Rep., (Ky.), 197.

County Com'rs Talbot County v. *County Com'rs Queen Anne's County*, 50 Md., 245, 259, 260.

Wells v. *City of Weston*, 20 Mo., 387, 391.

In re Lands in Town of Flatbush, 60 N. Y., 398, 406, 407.

Platt v. *Milton*, 58 Vt., 608.

Simon v. *Northrup*, 27 Oregon, 487, 503, 504.

Berlin Mills v. *Wentworth's Location*, 60 N. H., 156.

In re Madera Irrigation District, 92 Cal., 296, 304.

Farris v. *Vanmer*, 6 Dak., 186.

2. This rule requires more than that the tax be laid by, and paid into the treasury of, a government from which the taxpayer benefits. *It demands that one taxpayer be not charged more than others of the expenses of a government which they both enjoy, because of and in proportion to the taxes which those others pay for the support of other governments from which the first named taxpayer does not benefit.* Otherwise, the rule comes to nothing; for it is quite immaterial whether the taxpayer (in the case just supposed) is made to pay taxes *directly* for the support of the other governments under which he does not live or hold property, or is made to pay to the government under which he does live or hold property more tax than others under that government are required to pay, because of and in proportion to the taxes which such others pay to the governments whose benefits the first taxpayer does not share. Concretely, what dif-

ference in substance and effect does it make, either to the North-Western Railway Company or to the residents of Detroit, whether the North-Western Railway Company is taxed *directly* by or for Detroit, on account of the expenses of its local government and local investment-enterprises—with the result thereby of relieving the inhabitants of Detroit from a part of those expenses—or the North-Western Railway Company is taxed more by and for the state, on account of the expenses of Detroit's local government and local investment-enterprises,—with the result of relieving the inhabitants of Detroit from a part of the state's expenses? The inhabitants of Detroit ought to be as well pleased with one plan as the other, for under either they get the benefit of increased taxation put upon the North-Western Railway Company's property in the northern part of Michigan, *in consequence of Detroit's local expenses.* It can make no difference to Detroit residents whether the North-Western Railway Company, in consequence of Detroit's expenses, is required to pay \$1,000 tax toward meeting those expenses directly, or is required to pay \$1,000 to the state, in order that they may be relieved from the necessity of paying that sum to the state. In either case, the North-Western Railway Company helps the citizens of Detroit out, because they have local expenses (partly public and partly private) from which the North-Western Railway Company gets no advantage. And the *reason* why the North-Western Railway Company has to pay an increased tax is that the statute charges it not only because of the expenses of the state, but also because of the expenses of Detroit (as well as of counties, cities, towns, villages and school districts generally).

This Michigan statute itself recognizes, and is founded upon, the very plain principle just applied in argument, viz., that it makes no difference how the aggregate tax burden is divided for different taxpayers between state tax, on the one hand, and local taxes, on the other hand; for the rule of this statute is that one taxpayer may justly be relieved of local taxes, if he pays proportionately more state tax, while another taxpayer is required to pay local taxes because proportionately relieved from state tax. That is a central idea of the enactment under consideration. If it were given operation, to the end only of equalizing aggregate taxes of different taxpayers in the same taxing jurisdictions (*i. e.*, under the same governments), the argument now being made would not be applicable; but the trouble is that *the principle of equalizing aggregate tax burdens is applied between taxpayers of different jurisdictions*,—living and having their property under different governments—with the result of really taxing the railroads (on account of their relief from local taxes in places where their property *is* situated) more for the state, in proportion to the local taxes in places where their property is *not* situated, and so making them really share the burden of local taxes in whose benefit they do not participate. And, both in the substance ot things and on the principle of this statute itself (which regards aggregate taxation, state and local, as the important thing, and the division of that aggregate between state and local taxes as unimportant), it cannot make any difference whether a railroad pays more tax in *direct* or in *indirect* relief of others from the expenses of local governments whose benefits that railroad does not share.

Judge Cooley said:

"In considering the legality of the purpose of any particular tax, a question of first importance must always concern the grade of the government which assumes to levy it. The 'public' that is concerned in a legal sense in any matter of government is the public the particular government has been provided for; and the 'public purpose' for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. There may, therefore, be a public purpose as regards the federal Union, which would not be such as a basis for state taxation, and there may be a public purpose which would uphold state taxation, but not the taxation which its municipalities would be at liberty to vote and collect. The purpose must in every instance pertain to the sovereignty with which the tax originates; it must be something within its jurisdiction so as to justify its making provision for it. The rule is applicable to all the subordinate municipalities; they are clothed with powers to accomplish certain objects, and for those objects they may tax, but not for others, however interesting or important, which are the proper concern of any other government or jurisdiction. State expenses are not to be provided for by federal taxation, nor federal expenses by state taxation, because in neither case would the taxation be levied by the government upon whose public the burden of the expenses properly rests. To provide for such expenses would consequently not be a purpose in which the people taxed would in a legal sense be concerned."

1 Cooley on Taxation (3d Ed.), 187-8.

See, also:

Town of Belle Point v. *Pence*, 17 S. W. Rep. (Ky.), 197.

Howell v. *Bristol*, 71 Ky. (8 Bush), 493, 499.

County Com'rs of Prince George's County v. *Com'rs of Laurel*, 70 Md., 443, 447.

Ryerson v. *Utley*, 16 Mich., 269, 276.
State v. *Leffingwell*, 34 Mo., 458, 473.

3. It hardly needs argument to show that a railroad is not benefited by the expenses (public or proprietary) of the counties, cities, towns, villages and school districts, where it has no property or office. Four considerations, however, will readily show this:

(a) The legislative establishment of the boundaries of any political subdivision of the state determines not only the range of action of its local government, but equally the reach of that government's benefits. If the municipal boundaries be not the line of division between those who are and those who are not benefited, as well as governed, there is no line at all.

(b) A local legislature—of a county, city, village, town or school district—considers (and should consider) in determining its action only the interests of its own constituency. It is not for the Detroit city council to regard the rest of the state, or any part of it beyond the city boundaries, in deciding whether to create a fire department or to establish a park or a library. That question should be decided in obedience to the city's advantage. And the persons and property whose advantage the local legislature does not heed cannot be regarded as sharing legally the benefits of their action. Doubtless, the real reason why anybody is held to be benefited by the action of a government is that that person is one whose interests the government is entitled, and required, to consider; and for whom, therefore, that government must be held to have decided that he will be benefited by its action. Nobody, then, outside the jurisdiction of a local leg-

islature can be held benefited by its action. The question of his benefit that legislature had no right to decide.

(c) If railroad property everywhere in the state can be deemed to share the benefits of each local government in the state, that result must be also true of all the thousand different kinds of property throughout the state. How can it be said that a railroad in the Upper Peninsula of Michigan shares the advantages of Detroit's local government, and that no other property in the Upper Peninsula participates in those advantages? In a wide and indirect way it is doubtless true that all persons and property in Michigan are better circumstanced because of the work of government in each local community; but similar (and undoubtedly as large) benefit comes to them from the governmental operations of the neighboring states, and the local communities of those states. Such benefit is merely indirect and incidental,—not immediate, and not of the kind that the law can consider and make the basis of taxation.

The statute in hand does not charge more tax upon anybody or anything, but a few corporate properties, beyond the limits of a given county, city, town, village or school district, because of any expenses of that county, city, town, village or school district; and it, therefore, negatives the idea that any persons or property can be said to share the benefit of local governments under which they do not exist. Railroads cannot be distinguished, in that respect, from *all* other kinds of property.

(d) Finally, no doubt can exist as to the purely lo-

cal benefit from municipal expenditures which are of an economic, rather than a strictly governmental, character; such as for gas works, water works, parks, libraries, baths, street railways, etc. As already seen, those municipal enterprises, both under the authorities generally and by the settled law of Michigan itself, are strictly private. They are the private property of the inhabitants of the municipality which establishes them. Nobody outside the municipality shares that property. It is impossible to say that persons and property beyond the municipality that creates and owns them can properly be made to help pay for them. And yet, this statute of Michigan makes no distinction, in determining the "average-rate" of tax to be paid by railroads, between local taxes for local government and local taxes for local investments. It, therefore, in a most important feature, charges railroads for the cost of creating, and of maintaining, local improvements in which they have no share. What could be a more fundamental fault in the law? It is not too much to say that in the near future—if not already—the expenditures of cities and towns for such local enterprises as gas works, water works, libraries, baths, street railways, parks, etc., will exceed their outlay for the ordinary operations of local government. And the "average-rate" plan of taxation, as exemplified by this act of Michigan, proposes to make railroads (and railroads alone) help pay for such municipal enterprises even *in all places where no part of the railroad is situated.* Can it be that Detroit can spend \$10,000,000 or \$20,000,000 for a street railway or a library or a park, and (by the operation of such a law as that under dis-

cussion) be consequently relieved by the railroads elsewhere in Michigan from a part of the amount of state tax that, if Detroit does not establish the street railway or library or park, its inhabitants will have to pay? Their relief in that way and on that account is undeniable; for it is only common sense that if the railroads are required to pay more state tax than the law puts upon them in case Detroit does not spend money for local improvements, then a smaller amount of state tax is needed, and will be raised, from other persons and property, both within and without Detroit.

III.

The rule that *taxes cannot be laid by or for communities whose benefits the taxpayer does not share* has the closest connection with the point just considered,—that taxes must not be founded upon, and proportionate to, the expenses of such communities (which are really foreign to the taxpayer); and already it has been shown that *the necessary result of the measurement of appellants' state tax by the local taxes of the local communities throughout the state (in the larger part of which appellants have no property) is to tax a railroad, actually, for the relief of the inhabitants of all those local communities (including those where the railroad has no property)* from a part of the burden of their local governments and their local municipal enterprises. I desire now to add, first, a few utterances of authority; and, next, the point that *such contribution by a railroad toward the relief of local communities whose benefits the railroad does not share*

must be deemed a central and conscious purpose of the statutory plan.

1. The rule,—that persons and property cannot be taxed by or for governments under which they do not exist, and whose benefits they, therefore, do not share, —is elementary.

State Treasurer v. *Auditor General,* 46 Mich., 224, 230, 231.

Callam v. *Saginaw,* 50 Mich., 7, 11.

Louisville Ferry Co. v. *Kentucky,* 188 U. S., 385.

D. L. & S. W. R. R. Co. v. *Pennsylvania,* 198 U. S., 341.

1 Cooley on Taxation (3d Ed.), 84.

In another place, the same writer says:

"Those cases in which it has been held incompetent for a state or municipality to levy taxes on persons or property not within its limits have generally indicated the want of jurisdiction over the subject of the tax as the ground of invalidity. But such a burden would be inadmissible, also, for the further reason that, as to any property or person outside the district in which the tax was levied, the want of legal interest in the tax would preclude its being subjected to the burden. A state can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another state, than it can subject all the citizens or all the property of such other state to its power. The accidental circumstance that it may happen to have the means of reaching one and not the rest can make no difference; there must be an interest in the subject-matter of the tax; there must be between the state and the taxpayer a reciprocity of duty and obligation; and these in contemplation of law would be wholly wanting in the case supposed."

1 Cooley on Taxation (3d Ed.), 249.

Judson on Taxation, Sec. 354.

2. The violation of this principle by the Michigan statute is not casual or slight (if that could make any difference), but is a consequence of the fundamental idea of the "average-rate" plan (when not restricted to averaging the taxes of those communities within which some part of the railroad is situated).

The statutory idea is that it is just to equalize the *aggregate* tax burden of a railroad and the *aggregate* tax burden of others; and that this equalization of tax burden should be effected—not merely between the railroad and others in the same places as the railroad—but between the railroad and *all* others in the state, without reference to the fact of their location within, and benefit through, different and widely separated local governments. Concretely, again, the conscious purpose of the legislature was to make the North-Western Railway Company pay on its property in the Upper Peninsula a state tax equal to the total of state and local taxes paid on property of like value in Detroit and the other cities of Southern Michigan; notwithstanding the fact that no part of the North-Western road is in Southern Michigan. *The statute, therefore, directly contemplates, and seeks, that the tax paid by the North-Western Railway Company to the state shall be enough higher than the citizens of Detroit pay the state to balance or equalize what taxes the latter pay for local purposes.* That follows necessarily from the purpose of equalizing aggregate tax burdens. Consequently, the railroad is by the very design of the statute made to pay more state tax *in order that the citizens of Detroit may pay less,* because the latter pay Detroit's local taxes, and in proportion to such local taxes. That is taxing the North-Western

Railway Company for the relief and benefit of Detroit's citizens, as really and as designedly as if it were required to contribute directly towards Detroit's local outlays.

Putting the matter another way,—if Detroit raises $5,000,000 in local taxes, the average-rate paid by the North-Western Railway Company will be one figure. If Detroit's local taxes, instead, are made $15,000,000, the average-rate paid by the North-Western Railway Company becomes higher. The difference in what the North-Western Railway Company pays the state is *solely because Detroit's citizens pay more local taxes in the latter case.* Now, in consequence of the increase of the average-rate applied to railroad property, the rate of state tax paid by Detroit's citizens either is reduced (if the state needs no more revenue than it would have gotten from the lower average-rate), or remains the same (if the state needs more revenue, and would have been compelled to raise the general rate of state tax but for the increase of the average rate). In either case the Detroit citizen pays less state tax than he would but for the increase of the railroad tax on account of the increase of Detroit's local taxes; *i. e.*, the Detroit citizen pays less state tax, just in proportion as the North-Western Railway Company pays more state tax, on account of Detroit's local expenses. That means that *the North-Western Railway Company is taxed, not only because, but indirectly to relieve the Detroit citizens from part of the cost, of Detroit's local government and local investments.* And such is the plain design of the statute; involved in, and proceeding from, its purpose of "equalizing" aggregate

tax burdens—making a railroad pay a state tax large enough to balance what others, *everywhere* in the state, pay for local as well as state taxes.

Such a plan unmistakably taxes the North-Western Railway Company on its property located entirely in Northern Michigan to help the inhabitants of Detroit in their local government and their municipal improvements.

IV.

Taxation always involves "apportionment." The more obvious branch of that legislative problem concerns the distribution of a single tax among its several contributors. The larger aspect of the matter, however, is in the problem of distributing the burden of the state's entire revenue among all who contribute to it through any kind of tax. The legislature has to decide, not only what total revenue the state should have, but what parts of that revenue shall be exacted from different classes of taxpayers. Ordinarily, the relation prescribed by the legislature between the taxes of different classes of taxpayers is implicit, and not directly announced; but the prescription of that relation is not less real or important. The statute under consideration, however, creates an express and definite relation between railroad taxes, on the one hand, and all other persons' taxes, on the other hand. It prescribes, and sets forth as its chief purpose, that the tax paid by a railroad to the state on property of given value shall be equal to the average tax paid by others *throughout the state* to the state *and to their respective local governments.* A rule of apportionment

of tax burdens is, therefore, made the primary feature of the statute. That rule is constitutionally indefensible, and wholly deceptive in its pretense of justice.

1. The very nature of apportionment involves that the legislature determine and prescribe how the tax of one class shall compare with the taxes of other classes *for the expenses of the same governments.* It is not apportionment of taxes, and it is not taxation, when the legislature directs that A's total taxes for one set of governments under which he lives and whose benefits he enjoys, shall be equal, or bear any other prescribed relation, to B's total taxes for a *different* set of governments, under which A does not live and whose benefits he does not share. What would be thought of this statute if it said that a railroad should pay a state tax to Michigan equal to the taxes paid, on the average, for state and local purposes in Ohio? That would be absurd, and a transgression of the powers of the legislature, on its face; because it is the business of the legislature to fix any man's tax in what it considers a just relation to what others contribute for the benefit of the same governments,—not for the wholly different benefits of different governments.

But *this statute of Michigan is in principle not different from one equalizing appellant's Michigan tax with taxes in Ohio;* for appellant no more lives under or gets the benefit of the local governments of the counties, cities, towns, villages and school districts of Michigan in which it has no property, than it gets the benefit of the state and local governments of Ohio. The impossibility of saying that railroad property is benefited by the operations of the local governments in

whose jurisdiction no part of its line is situated (when, too, the laws of Michigan treat no other of the thousand different kinds of property as so benefited) has already been sufficiently presented. See Point II, on pp. 49-58, *ante*. The purely private character of the local enterprises for which local taxes are largely levied, as already established by the Michigan Supreme Court, may, however, be particularly recalled.

While the decisions concerning apportionment naturally speak primarily concerning distribution of one tax, rather than several, they illustrate forcibly the presence of this feature always in taxation. Thus, Judge Cooley declared, for the Michigan Supreme Court:

"I understand that in order to render valid a burden imposed by the legislature under an exercise of the power of taxation, the following requisites must appear:

"1. It must be imposed for a public, and not for a mere private, purpose. * * *

"2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. *A state burden is not to be imposed upon any territory smaller than the whole state, nor a county burden upon any territory smaller or greater than the county.* Equality in the imposition of the burden is the very essence of the power itself and though absolute equality and justice are never attainable, the adoption of some rule tending to that end is indispensable.

"3. As a corollary from the preceding, if the tax is imposed upon one of the municipal subdivisions of the state only, the purpose must not only be a public purpose as regards the people of that subdivision, but it must also be local, that is to say, the people of that

municipality must have a special and peculiar interest in the object to be accomplished which will make it just, proper and equitable that they should bear the burden, rather than the state at large or any more considerable portion of the state."

People v. *Twp. B. of Salem*, 20 Mich., 453, 474.

In his text-book, the principle is again well stated;—

"Taxes are collected as *proportionate* contributions to public purposes. But to make them such in any true sense they must not only be such as between the persons called upon to pay them, *but also as between those who ought to pay them.* It is therefore of prime necessity in taxation that it should first be determined what public—whether state or local—should bear the burden, and that it should then be imposed *ratably as between those who constitute that public.* If a single township were to be required to levy upon its inhabitants and collect and pay over to the state whatever moneys were necessary to pay the salaries of the several state officers, it would be apparent, 'at first blush,' that the enactment was not one which, either in its purpose or tendency, was calculated to make the taxpayers of that township contribute only their several proportions to the public purpose for which the tax was to be levied. *If, on the other hand, for the purpose of purchasing and ornamenting a city park or any other improvement of mere local convenience, a tax should be imposed upon the whole state, it would be equally manifest that equality and justice were not the purpose of the imposition, but that, if carried into effect, the people of the state not residing in the city would be compelled to contribute to a purpose in which, in a legal sense, they had no interest whatever.* * * *

"The cases suggested are extreme cases, but the principle that controls them is universal, and a disregard of it is fatal to the tax; and whether the unjust consequences are slight or serious is unimportant. Where the principles of taxation are disregarded, every one is entitled to claim strict legal right; for in

no other way can the power be restrained from perversion and oppression. *It can therefore be stated with emphasis that the burden of a tax must be made to rest upon the state at large, or upon any particular district of the state, according as the purpose for which it is levied is of general concern to the whole state, or, on the other hand, pertains only to the particular district.* A state purpose must be accomplished by state taxation, a county purpose by county taxation, or a public purpose for any inferior district by taxation of such district. This is not only just but it is essential. To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties. 'By taxation,' it is said in a leading case, 'is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of certain sums by one portion or class of people to another.' This principle has met with universal acceptance and approval because it is as sound in morals as it is in law."

1 Cooley on Taxation (3rd Ed.), 225-227.

For special examples see:

A. T. & S. F. Ry. Co. v. *Clark*, 60 Kas., 826, 830.

Hutchinson v. *Ozark Land Co.*, 57 Ark., 554.

State v. *Laughlin*, 75 Mo., 145.

State v. *Township Committee*, 36 N. J. Law, 66.

Kansas City v. *Whipple,* 136 Mo., 474, 484.
State v. *Hoyt,* 71 Vt., 59.

The aspect of the matter directly in hand is well presented by the Supreme Court of Wisconsin, which holds that the rule of uniform taxation "requires such uniformity, in case of a state tax, to extend throughout the state; in case of a county tax, to extend throughout the county; in case of a city tax, to extend throughout the city; and, in case of a town tax, to extend throughout the town."

Lund v. *Chippewa County,* 93 Wis., 640, 647.
State, ex rel. City of New Richmond v. *Davidson,* 114 Wis., 563, 575-578.
State, ex rel. Garrett v. *Froelich,* 118 Wis., 129, 140.

In the last case the court said:—

"To come within the rule of uniformity, as thus defined, it is necessary, not only that the object of the appropriation in question should be public, but also that it should subserve the common interest and well-being of the people of the state." (P. 140.)

It is true that these Wisconsin cases relate to a question of "uniformity" under the state constitution; but the principle they announce is applicable none the less to all apportionment of taxes. In the absence of a constitutional requirement (and, indeed, in many states even under such a requirement) taxation need not be equal between different classes. The legislature may tax the different classes unequally, if it regards that as just. *But,* what it must consider and decide is whether the taxes of different persons for the same government or the same set of governments shall be

equal or unequal; and, if the latter, how much *that* inequality shall be. The legislature has no authority, in distributing taxes, to make the tax of any class depend upon, and bear a definite relation to, taxes paid by other classes to governments having no jurisdiction over, and not acting for the benefit of, the first class.

Apportionment on a proper principle is essential in all taxation.

"When the state has need of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner either under the power to tax or the right of eminent domain. There is a difference in the two cases which is vital. When property is appropriated under the right of eminent domain, a particular item or parcel is taken, because for public purposes there is special need of it, and the state takes it under proceedings which amount, so far as the owner is concerned, to a forced sale. *But taxation is based upon the idea of calling upon the people for equal and proportional contributions to the public wants, that the burdens of government may fall ratably upon all who in justice should bear them. Apportionment of the burden is therefore a necessary element in all taxation.*"

1 Cooley on Taxation (3rd.), 411.

To the same effect:—

Judson on Taxation, Sec. 340.

Morton v. *Comptroller*, 4 La. An., 454.

Field, J., in

18 Fed. Rep., p. 400.

City of Lexington v. *McQuillan's Heirs*, 8 Dana (Ky.), 513, 517-519.

Field, J., in
13 Fed. Rep., 722, on p. 734.

Sawyer, J., in
18 Fed Rep., on p. 424.
Williams v. *Mayor of Detroit,* 2 Mich., 560, 572.

Beasley, Ch. J., in
Central R. R. v. *State Board,* 48 N. J. Law, 1, on p. 11.

Depue, J., in
State v. *Township of Redington,* 7 Vroom, 66.

2. The result of ordering a relation of "equality" between a railroad's taxes and the taxes of others in places where the railroad is not, in any part, situated is *to neglect utterly, and leave haphazard, the question how the taxes for those governments which have jurisdiction over the railroad and whose benefits it does share (viz., beside the state, the counties, cities, towns, villages and school districts which the railroad does enter) shall be distributed among the persons and property under those governments.* We will take the North-Western Railroad again for an example. Whether its taxes on its property in the Upper Peninsula shall be equal to, more than, or less than, the taxes (state and local) on other property of like value in the Upper Peninsula, will depend each year on the accidental relation of local taxes in the northern and southern municipalities of the state. If local taxes are higher one year, on the average, in the Lower than in the Upper Peninsula, the "average-rate" applied to the North-

Western Company's property will be *higher* than the total rates for state and local purposes applied to other property in the Upper Peninsula. On the other hand, if the next year local taxes are higher, on the average, in the Upper Peninsula than they are in the southern part of the state, then the "average-rate" applied to the North-Western Company's property in the Upper Peninsula (being largely, and, indeed, chiefly, dependent on local taxes in that larger part of the state constituting the Lower Peninsula) will that year be *lower* than the total rates for state and local purposes on other property in the Upper Peninsula. If equality of rates on the railroad property and on other property in the same places ever occurs, under this average-rate plan, it will be the strangest and most infrequent of accidents.

It is thus obvious that *the legislature has not said at all whether a railroad shall be taxed equally with, or higher or lower than, other property under the same governments.* One year the railroad tax will be higher, another year lower; and, doubtless, it will never be the same as the tax on other property in the same places. The legislature, therefore, in prescribing a relation between railroad tax and other taxes for governments under which the railroad does *not* live, has entirely neglected the question of what relation it deems just, and will impose, between railroad taxes and the taxes on other property in the same communities. *The problem of real and just apportionment it has not attacked at all; and it has fixed no rule concerning it.* It is left to depend on the varying action of the hundreds of local legislatures of Michigan, from year to year, in

determining questions of purely local policy, partly governmental and largely domestic and private.

The charge imposed upon a railroad under the Michigan "average-rate" plan is not a tax, for the reason just stated, viz., that it is not a charge which the legislature establishes as that portion of the expenses of the governments whose benefits the railroad enjoys which it is just for the railroad to pay in comparison with what others are required to contribute for support of the same governments. The sole pretense of apportionment, underlying the "average-rate" plan, is not apportionment at all; but an exaction unrelated to other persons' taxes for those governments within whose jurisdiction the railroad exists.

3. What becomes of the claim for this statute that it seeks just taxation, because its aim is to make railroads pay taxes at the same rate as other people? That is just what it does *not* do, in any true sense. Instead, as already seen, it operates necessarily to make a railroad pay a tax at a rate one year higher, and another year lower, than others pay in the same places and for the same governments. And, whether the railroad rate of tax shall be higher or lower is chiefly controlled by the action,—not of the governments where the railroad is situated—but of governments having no jurisdiction over the railroad, acting on questions of local policy (in deciding which they neither should nor do consider the interests of any persons outside their jurisdiction), and performing operations and conducting local enterprises in which the railroad has no share and from which it derives no benefit.

Justice means, in taxation as in other things, like

treatment, under like circumstances, or under circumstances not fairly calling for unlike treatment. *Like treatment under unlike conditions is as apt to be unjust as unlike treatment under like conditions.* Why is it just to collect the same amount of tax on a given amount of property when in the case of one taxpayer the property is in a city of the Upper Peninsula, or in the country there, and in the case of the other taxpayer the property is in Detroit or other large city in the more developed southern part of Michigan? Why should the taxes be "equalized" on such differently situated properties? *Why not as well say that it is just to make property in northern Michigan pay the same rate of tax as other property just across the state line, in Wisconsin?* How is it just to tax a railroad in one place after a plan that seeks "equality" of its tax-rate with the rate in other places which spend millions for gas-works, water-works, street-railways, parks, libraries, baths and other private investments in whose benefit that railroad (in another place, entirely) does not share? Such taxation seeks to charge different persons the same amount, it is true, *but for different things;* and, as we have already seen, charges *different* amounts to railroads and others *for the same thing,* viz., the benefits of those governments where the railroad is situated.

Nor is the matter helped by the "averaging" which this statute does. That does not alter or disguise the nature of the process. It is not different to make the tax on the North-Western Railroad property in northern Michigan depend upon the taxes of *all* the cities in the Lower Peninsula from making it depend on the

taxes of Detroit alone. The property of a railroad in northern Michigan is no more benefited by the local governments and local investments of one than of any other city in southern Michigan. There is no more reason why that railroad should pay more tax because Lansing or Kalamazoo or Grand Rapids has a park, or a street-railway or a library or gas-works or water-works, or because all the cities of southern Michigan have those things, than because Detroit has them. No quality of fairness is added because the local taxes of many communities are used in computing the "average-rate," when the use of the taxes of *any* of those communities is unjust.

Let it be remembered, too, that there is nothing in the character of a railroad that will justify application to it of the plan of this Michigan statute, which will not as well support its application to any kind of property. The plan, if allowable at all, is capable of indefinite expansion. Why not say at once that *any* property, situated in more than one political subdivision of the state, shall be taxed at an "average-rate," derived from the state tax and the local taxes everywhere in the state? Here again comes out the vast and fundamental difference between an average-rate, founded upon the taxes in those places where some part of the property (if an extended unit) is situated and, on the other hand, an average-rate founded largely upon taxes in places where no part of the property is situated to which the average-rate is applied. *If the process of the present statute can be applied to property in eight out of the eighty-three counties of Michigan (as in the case of the North-Western Railroad), it surely can also be*

applied to any property situated in two counties. Where is the line at which it must stop?

4. The Michigan Supreme Court, when declaring unconstitutional an identical "average-rate" statute (before the amendments of 1900 to the state constitution were adopted) said:

"Again,—treating the tax imposed as one on property based on valuation, and not as a specific tax, the corporations and associations mentioned in this act can no more be discriminated against, as to the assessments made or taxes exacted, than can merchants, manufacturers or farmers. The tax levied in this act is the average rate of all taxes levied by the state, counties and municipalities throughout the state. *A telephone company in Tecumseh, where the local taxation added to the state tax may not exceed one and one-half per cent. may, under this act, be required to pay two and one-half per cent. Under the Atkinson Bill a railroad in the Northern Peninsula is required to pay the same rate as one having the terminus in Detroit and extending through territory in which local improvements are expensive and schools are maintained at great cost.*" (p. 108.)

Pingree v. *Auditor General,* 120 Mich., 95. on page 108.

The court evidently had in mind the impropriety of making the tax on property in one or more places depend upon, and increase with, the taxes in other places for governments and local improvements which the taxed property does not enjoy.

V.

The power of fixing the rate (and so the amount) of tax upon appellant's property is delegated by this statute of Michigan to the various local legislatures of the counties, cities, towns, villages and school-districts of Michigan. It is upon their legislative action that the rate chiefly depends. And, as appellant's railroad is largely outside the jurisdiction of those local legislatures, and is none of it within the jurisdiction of more than a limited local group of those legislatures (though the tax results from the action of all in the state), *the tax is imposed by legislative bodies that do not represent the taxpayer.*

1. It is not enough for the state legislature to say that there shall be a tax; and then leave the amount of the tax to be fixed by others. There is no tax until its amount is prescribed and the body that determines the amount levies the tax.

"An indeterminate tax is in law no tax."

Cooley on Taxation, (3d Ed.), 557.

Morton v. *Comptroller General*, 4 So. Car., 430, 454.

Houghton v. *Austin*, 47 Cal., 646.

S. F. & N. P. R. R. Co. v. *State Board*, 60 Cal., 12, 34.

This is evident. A legislature that taxes must determine the tax in view of what it considers the state needs and of what it considers the particular class of taxpayers may justly be required to pay. The legislative power of taxation is to pass upon those

questions; the exercise of the power is a decision of those questions; and they are not decided until the amount of tax is fixed.

The Michigan Constitution expressly requires all taxing statutes to state the tax, and indeed to state it directly, *and not by reference.* It provides:

"Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."
Michigan Constitution, Art. XIV, Sec. 14.

This provision was borrowed from the Constitution of New York, after it had been construed by the highest court of that state in

People v. *Board of Supervisors of Kings County,* 52 N. Y., 556.

In that case, a statute imposing a tax of three and one-half mills per dollar "or so much thereof as may be necessary" for specified purposes was held not to state the amount of tax, and, therefore, to violate the Constitution.

2. And the legislature that taxes, and therefore fixes the amount of tax, must be that which represents the taxpayer; that is, the legislature which is chosen by the community which includes the taxpayer or his property. Nothing is more fundamental than this requirement.

McCulloch v. *Maryland,* 4 Wheat., 427.

Providence Bank v. *Billings,* 4 Pet., 514, on page 563.

Wilcox v. *Paddock,* 65 Mich., 23, on pages 28 and 29.

People v. *Hurlbut*, 24 Mich., 44; especially the language of Judge Christiancy on pages 64-66, Chief Justice Campbell on page 89, and Judge Cooley on pages 97-110.

Board of Park Com'rs. v. *Detroit*, 28 Mich., 227, on pages 244, 245, 247, 249 and 250.

Board of Com'rs. v. *Abbott*, 34 Pac. Rep., 416 (Kas.).

Schultes v. *Eberly*, 82 Ala., 242; especially on page 246.

Parks v. *Board of Com'rs*, 61 Fed., 436.

Harward v. *St. Clair Drainage Co.*, 51 Ill., 130; 134-136.

United States v. *New Orleans*, 98 U. S., 381, 392.

Thompson v. *Allen County*, 115 U. S., 550, 555.

City of Lexington v. *McQuillan's Heirs*, 8 Dana (Ky.), 513, 517, 518.

3. The local legislature of a county, city, town, village or school district of Michigan does not represent railroads or anybody else, when they and their property are wholly beyond the boundaries of the community choosing such legislature; nor does it represent railroads or other persons that live elsewhere but have *some* property within its jurisdiction, as to other property situated in other jurisdictions.

(a) In order to be representative, a legislature must be, not only chosen by the community for which it acts, but likewise chosen to act for, and upon, the persons or property affected. Nobody outside the limits of a particular county, city, village, town or

school district participates in the selection of the members of its local legislature; and the purpose of their selection is to legislate for the particular community which chooses them.

Judge Cooley said:

"A representative, as we understand it, is one chosen by a principal to exercise for him a power or perform for him a trust. In that sense, the mayor of Detroit is a representative for some purposes, the members of the common council for others, and the members of the board of education for still others. But the idea of a representative implies not merely a person chosen for some purpose, but a person chosen for a particular purpose, and confided in to represent his principal therein. One person may be thought suited to one duty, and another to another; and the right to be represented implies a right not merely to name the person, but also to designate the trust that shall be confided to him. That government would be but a mockery of republican institutions, which, while leaving to the people a choice of officers, should afterwards determine whether any particular officer who had been selected by the people should be a legislator or a judge, a governor or a policeman."

Board of Park Com'rs v. *Common Council of Detroit*, 28 Mich., 227, 245.
Cook Farm Co. v. *Detroit*, 124 Mich., 426.

Chief Justice Waite declared:

"We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other."

United States v. *Cruikshank*, 92 U. S., 542, 549.

(b) The various local legislatures, too, *consider* in their action only local conditions and needs. They have, in fact, no right to consider anything else. And they cannot be held to represent persons or property whose interests they do not consider.

(c) A county, town or school district board, or a city or village council, cannot be considered representative of railroads, but of nobody else, as to property outside the local community. It no more does, or can, act for one than for another part of the persons and property throughout the state.

4. We come, then, to the main point, that the amount of tax required to be paid on railroad property is largely, and, indeed, chiefly, determined by the local legislatures throughout Michigan in their legislative prescription of local taxes; for by the amount of those taxes the railroad tax is chiefly measured. Various considerations make this manifest. Indeed, it is the obvious reality. Pertinent authority, too, exists.

(a) The actual dependence of the "average-rate" upon the amount of local taxes everywhere in the state is undeniable; and the action which determines that amount is *purely legislative*. The local legislatures, in fixing the amount of local taxes, have the same full, legislative discretion as belongs to the state legislature itself. They are not using executive or administrative power, or doing executive or administrative work. They are using legislative power and doing legislative work. They are deciding and imposing legislative policies. How, then, can it be that the amount of appellant's tax, which depends on and is measured by the legislative decisions of the local legislatures, is not legislatively determined by those legislatures?

This case is entirely different from those in which the operation of a statute is made to depend upon a contingent *fact*, or upon the decision of an executive or administrative officer as to such fact. Then, the statutory rule does not depend upon, or vary with, another body's legislative discretion; indeed, does not depend upon, or vary with, anybody's discretion at all. The statutory rule remains all the time unaltered in all its fundamental features; and, besides that, the thing on which the rule's operation depends *is not further legislation*, by another body. For example,—

In *Miller* v. *Mayor of N. Y.*, 109 U. S., 385, this Court decided that legislative power was not delegated to the Secretary of War by an act of Congress authorizing construction of a bridge across the East River, on plans not prescribed in detail by Congress, but such as the Secretary of War should decide would "conform to the prescribed conditions of the act, not

to obstruct, impair or injuriously modify the navigation of the river." (See act quoted on page 387.) This act did not give the Secretary power to fix the character of the bridge arbitrarily (and so decide what, if any, obstruction of navigation should be allowed), but merely allowed that official to determine a pure fact, viz., whether the plans submitted by the Company would "obstruct, impair or injuriously modify" navigation. The act itself forbade any such obstruction; and, as Justice Field said, "By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that upon *a certain fact* being established, the bridge should be deemed a lawful structure, and employed the Secretary of War *as an agent to ascertain that fact.*" (p. 393.)

Again, in *Field* v. *Clark*, 143 U. S., 649, this Court upheld the Congressional Act of October 1st, 1890, by which it was made the duty of the President to suspend the free introduction of sugars, molasses, coffee, tea and hides, (allowed by that act) from countries which were found by him to impose upon the importation of those articles from this country "reciprocally unequal and unreasonable" duties (p. 680); in which event the former tariff of this country should again apply. The President, therefore, was made an agent to ascertain and proclaim the *fact* as to the state of other countries' tariffs; upon the happening of a given fact (which the President executively determined to exist, *but did not create*), the statute by its own declaration became inoperative, and the former tariff rule revived. Mr. Justice Harlan said:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. *Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.* The words, 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But *when he ascertained the fact* that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, *it became his duty* to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. *He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress.* As the suspension was absolutely required when the Presi-

dent ascertained the existence of a particular fact, *it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.* Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. *He was the mere agent of the law-making department to ascertain and declare the event* upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati, Wilkington &c. Railroad* v. *Commissioners,* 1 Ohio St., 88. In *Moers* v. *City of Reading,* 21 Penn. St., 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's Appeal,* 72 Penn. St., 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the court said was this: 'The legislature cannot delegate

its power to make a law; but it can make a law to delegate a power *to determine some fact or state of things* upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' "

Of this case it is to be noted, too, that Congress may doubtless exclude foreign goods altogether, if it sees fit, and hence may impose such conditions as it pleases upon their admission.

(b) The legislative action of the county, city, town, village and school district in determining the amount of local taxes, and so largely determining the "average-rate" of tax, is entirely *independent* of any rule prescribed by the state legislature to guide them. There is no standard or principle in Ch. 173, to which the action of the local legislatures is subordinate and must conform. On the contrary, their action is free and untrammeled; and it is Ch. 173 that is subordinate, and conforms to the local legislation, in respect of the amount of tax required of appellant.

Here is another fundamental peculiarity, and fault, of the Michigan statute; by which it is distinguished from the numerous cases holding that a legislature may properly empower executive or administrative officials to adopt *incidental,* executive rules of detail, which conform to the central plan and principles of a statute. For example,—

In *Butterfield* v. *Stranahan,* 192 U. S., 470, this Court held the "Tea Inspection Act" of March 2nd, 1897, not open to criticism because it empowered the

Secretary of the Treasury to establish "uniform standards of purity, quality and fitness for consumption of all kinds of tea" and itself declared that teas falling below those standards should not be imported. It was ruled that the statute created its own, fundamental standard of fitness for use, and merely allowed the executive officer to make incidental rules which in their true character were mere detail applications of the Congressional rule. Mr. Justice White said:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and, therefore, in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. *This, in effect, was the fixing of a primary standard,* and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark,* 143 U. S., 649, where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark,* that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect,

amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.''

Like cases are:

In re Kollock, 165 U. S., 526; see pages 533, 536.

St. Louis Consolidated Coal Co. v. *Illinois*, 185 U. S., 203; 210-212.

(c) So far is it from true that the local legislatures act in execution of Ch. 173, that they act without any thought whatever of the object of that statute, viz., state revenue. They have no right to think of anything but what their several localities may wisely spend, with a view to their own public and proprietary ends. That is not execution of the state statute, but independent legislation.

(d) The law concerning proximate cause furnishes an instructive analogy. When a result ensues from the acts of two persons, of whom one acts after and independently of the other, the law attributes the result wholly to the later actor. Intervening, independent action separates from the result the doings of any prior actor; which latter are the occasion or opportunity for the final event,—not the cause. So here. The independent, legislative action of the county, city, town, village and school district legislatures *intervenes* between anything the state legislature has done and the amount of tax on appellant's property.

(e) And, particularly, the local taxes are (as already fully seen) largely for private investments of the same localities whose legislatures levy them; and those investments the corporations taxed under Ch.

173 do not share. That means that the persons who compose the local legislatures have (both individually and as representatives of their respective communities) a *private interest* in the amount of taxes they order, which in no way concerns those persons, including appellants, who are outside the local community. It may be questioned whether even purely executive or administrative functions can properly be given, under a republican form of government, to officials who are not chosen by the community whose members are to be affected by their action. For example,—Could Congress commit to the members of a particular state legislature, or to the members of all of them, the executive powers that were given to the Secretary of War in the case of *Miller* v. *New York* (109 U. S., 385), or that were given to the Secretary of the Treasury in the Tea Inspection case (192 U. S., 470)? It would seem that even executive powers can be exercised only by officials who *represent* the persons over whom they are given power. But, beyond that, we have in the present case a statute which makes the rate of tax charged for state purposes upon appellant's property depend upon the action of local officials who not merely are largely not representative of appellant (which has no office or property within their communities), but who in their action are *pursuing interests that are purely private*,—the convenience and prosperity and *investments* of their own, particular localities—and are not indifferent, or disinterested, in their action. That certainly shows that the work of the local legislatures, in imposing local taxes, cannot be allowed, in any view of their functions, to fix the amount of appellant's tax.

In *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U. S., 203, where mine inspectors were allowed by the statute to fix their own fees, within the limits of $6.00 and $10.00, for each inspection, it was held that such rule was a fair executive arrangement, inasmuch as the inspectors were paid a salary, and their compensation was thus independent of their own decision. But Mr. Justice Brown said:

"Objection is made upon the ground that it gives to each mining inspector not only the right to determine the number of times each mine shall be inspected, but the fees to be charged in each case. *If his discretion were unlimited in this direction and the fees were retained by himself, there would be much force in the suggestion;* but the truth is that the amount of the fee must be in each case somewhere between $6.00 and $10.00, and must be paid to the Secretary of the Bureau of Labor Statistics, and by him covered into the State treasury, to be held as a fund for the payment of the salaries of the mining inspectors. Each inspector provided for by the act receives for his services $1,800.00 per annum, to be paid quarterly out of the funds in the state treasury received for the inspection fees, and in the event of such fees being inadequate to compensate such inspectors in the amount provided for herein, the deficiency of the salaries shall be paid out of the money in the state treasury not otherwise appropriated. It appears, then, first, that the state inspector receives a regular salary, neither increased nor diminished by the number of inspections or the amount paid for each inspection; and, second, that he receives such salary directly from the Bureau of Labor Statistics and not from the fees paid to him therefor. As his compensation is dependent neither upon the number of his visits nor upon the amount of his fees, it is difficult to see how he would gain by multiplying one or magnifying the other. We know of no reason why the legislature should deprive itself of the best attainable evidence of the facts it seeks to make determinative of these two questions."

What, then, can be thought of a law that makes the amount of public taxes to be paid by one class of persons depend upon the decisions of other persons (not representative of the taxpayers) as to what amounts they will spend for their purely private enterprises?

(f) Let us now turn to cases that, it is submitted, are directly in point to show that Ch. 173 delegates the taxing power to the various local legislatures; and, first, cases themselves concerning taxation.

Houghton v. *Austin*, 47 Cal., 646.
People v. *Supervisors of Kings County*, 52 N. Y., 556; 566-567.
Board of Commrs. v. *Abbott*, 52 Kas., 148.
Parks v. *Board of Commrs.*, 61 Fed., 436.
Central R. R. Co. v. *State Board*, 49 N. J. L., 1; 17, 18.
Muldenberg Co. v. *Morehead*, 46 S. W. Rep., 484 (Ky.).
Fleming v. *Dyer*, 47 S. W. Rep., 444 (Ky.).
Dawson v. *Ward*, 71 Tex., 72, 76.
Wade v. *State*, 22 Tex. App., 629.
McCabe v. *Carpenter*, 102 Cal., 469.
Schultes v. *Eberly*, 82 Ala., 242.
Wells v. *City of Weston*, 22 Mo., 384.
Wilcox v. *Paddock*, 65 Mich., 23; 28, 29.
State v. *Mayor of Des Moines*, 103 Ia., 76.
Marr v. *Enloe*, 9 Tenn., 452; 454.
Board v. *Houston*, 71 Ill., 318.
Gage v. *Graham*, 57 Ill., 144.

The following cases give instances of delegation of legislative power, in other fields than taxation:

King v. *C. F. Ins. Co.*, 103 N. W. Rep. (Mich.), 616.

Elliott v. *Detroit*, 121 Mich., 611.
Bradshaw v. *Langford*, 73 Md., 428.
People v. *Parks*, 58 Cal., 624; 641-3.
Dowling v. *Lancashire Ins. Co.*, 92 Wis., 62.
O'Neil v. *Ins. Co.*, 166 Pa., 77.
State v. *Bound Brook*, 48 At. Rep. (N. J.), 1022.
Stevens v. *Truman*, 127 Cal., 155.
Jernigan v. *Madisonville*, 102 Ky., 313.
Schaezlein v. *Cabaniss*, 135 Cal., 466.
Harmon v. *State*, 66 Ohio St., 249.
Beasley v. *Ridout*, 94 Md., 641; 658.
State v. *Rogers*, 73 N. E. Rep. (Ohio), 461.

In *Houghton* v. *Austin*, 47 Cal., 646, the statute was that a State Board, beside having equalizing powers, should "determine and transmit to the Board of Supervisors of each county the rate of the state tax to be levied and collected, which *after allowing for delinquency in the collection of taxes* must be sufficient to raise the specific amount of revenue directed to be raised by the legislature for state purposes." (Page 648.) This was held to delegate to the State Board the power of fixing the rate of state tax because that Board was given power to add to the rate resulting directly from state appropriations an indefinite sum for expected delinquencies in collection. The Court said:

"This section of the Code attempts to confer upon the State Board the power to add any sum to the amount of tax to be levied by law. We are of opinion that *the Legislature cannot commit to the Board this power to increase (by way of allowance for delinquency or otherwise) the amount of the tax to be paid by the people.*

In the course of the argument it seemed to be admitted that the Board had added to the amount directed to be raised by the Legislature a percentage which, in their opinion, would be sufficient to cover not only delinquencies, but 'the costs and expenses of collection.' If the power can be exercised at all, the Board may add the same percentage, calling it a percentage to meet delinquencies, which they in fact added to meet delinquencies and costs of collection. Or, as the sum needed is entirely a matter of conjecture, *and the additions to be made in the discretion of the Board,* they may add one hundred per centum, instead of the nineteen per centum which was added.

In case the Board shall over estimate the probable delinquencies, what shall become of the excess collected? Shall it be paid to the Controller as extra compensation for the arduous labors of that officer? It cannot be paid into the State Treasury, because the Legislature has directed a certain amount only to be raised.

The law-making power recognized by the Constitution may declare that the people shall be subjected to the payment of a certain sum; the State Board—if the section of the code is valid—may require the people to pay a greater sum. If it be said that the Legislature has subjected the people to the payment of a certain sum, and such additional sum as the State Board of Equalization shall see fit to name, we reply that neither can the Board be thus clothed with the power of imposing a subsidy, *nor can the Legislature refuse to fix definitely its amount.*

The members of the Legislature to whose judgment, wisdom and patriotism the high prerogative of making laws is intrusted, cannot relieve themselves of the responsibility by choosing other agencies; *cannot substitute the judgment, wisdom, and patriotism of others for their own.* 'One of the settled maxims of constitutional law,' says Judge Cooley, 'is that the power conferred on the Legislature cannot be delegated by that department to any other body or authority.' (Cooley, Const. Lim., 116, and cases cited.)" (Pages 652, 653.)

It was further said:

"Secondly, it is said that the legislative power is delegated in those cases in which a statute is to take effect conditionally, as on the happening of a future event. In this case we are not called on to decide whether a condition that a law shall go into operation only after a popular election, for example, renders the law nugatory. Nor is it necessary to inquire whether a distinction can be maintained between such a case and an attempt to transfer to an individual or board the power of changing the terms and conditions—the whole tenor and effect—of a statute after it shall have left the hands of the legislators. It is quite clear that in the latter class of cases the Legislature exceeds its authority. The law is not suspended until the happening of a certain event, but takes effect, it at all, when it leaves the Legislature; *the law itself, however, providing that it may be changed and a different law substituted, in the discretion of some person or persons named.* The Legislature cannot thus abdicate its functions in favor of its own creature." (Page 655.)

And again:

"The Political Code does not contain a specific and distinct statement of the tax to be levied. This was held to be necessary by the New York Court of Appeals in *The People* v. *The Board of Supervisors of Kings County*, the Court saying: 'They (the Legislature) must determine the amount necessary and adequate, and declare the amount to be levied absolutely.' *This is necessary, whether the Constitution, in terms, requires it or not, otherwise the whole legislative taxing power can be delegated.* Of course, however, the amount is fixed in effect when the Legislature has determined the data, so that the ascertainment of the amount becomes a mere matter of arithmetical computation." (Page 657.)

The case just cited by the California Court is *People* v. *Supervisors of Kings County*, 52 N. Y., 556. The character of the statute which was held invalid, as well

as the grounds of decision, will appear from the following quotation:

"The Constitution, prescribing the requisites of a law imposing a tax, is in harmony with the other provisions designed for the protection of the tax-payer. Its terms are precise and unambiguous, leaving no way of escape from a literal compliance with them, and no room for evasion by any lax interpretation. They are so plain they need no interpretation. It declares that 'every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.' (Const., art. 7, Sec. 13.)

The tax would have been well specified in amount but for a clause, found for the first time in a tax law. A tax of three and one-half mills upon the dollar of the assessed value of the real and personal property in the State is definite and certain. But the legislature have qualified the same and authorized the tax to be reduced if it should be found, upon a corrected estimate, that a lesser tax would give the necessary means. The law imposes a tax of three and a half mills per dollar, or so much thereof as may be necessary, to provide for the payment, etc. This is not a specific and distinct statement of the tax to be levied. It is simply a statement of the maximum tax to be levied, leaving it to the discretion of the administrative officers of the State to levy such tax as they shall find necessary up to the limit named. *The legislature cannot, under the Constitution, thus delegate the power of taxation. They must determine the amount necessary and adequate, and declare the amount to be levied absolutely.* If this form of enactment is allowable, a law authorizing a tax of fifty per cent. of the assessed value of the taxable property of the State, or so much thereof as might be necessary, would be valid, and the whole legislative taxing power delegated to the other departments of the State government. The law is invalid as not stating the tax imposed." (Pages 566, 567.)

The fact that the New York Constitution required, like the Michigan Constitution, that a tax law state the amount of tax does not lessen the force of this decision; because determination and statement of the amount of tax, either specifically or so that it can be known by "a mere mathematical computation," is (as the California Court declared) essential to the completeness of the tax in any case. The trouble was, in both the California and New York cases, that a *discretion* about the amount of tax was left by the legislature to others. Neither one is as palpable an instance of delegating the power to determine the amount of tax as Act 173, under which the state tax upon appellant's property is *left to the completely independent action of local legislative bodies.* Some sort of guidance was given by the legislature, in the California and New York laws, to the boards who determined the tax; none whatever is given by the Michigan act to the local legislatures, for they make their levies of local taxes in entire independence.

In *Commissioners of Wyandotte County* v. *Abbott*, 52 Kas., 148, the following statute was held unconstitutionally to delegate the taxing power:

"That whenever a majority of the resident landholders within one-half mile on either side along the line of any regularly laid out road, within the terminal points mentioned in the petition, shall petition the board of county commissioners of any county in this state for the improvement of any road as located, or any part thereof, it is hereby made the duty of such county commissioners to cause the same to be improved, as hereinafter provided." (Laws of 1887, Ch. 214, Sec. 1.) (Pages 158, 159.)

The Court said:

"The first contention is, that chapter 214 is unconstitutional because it attempts to delegate legislative power to the petitioners, and confer upon them the absolute and arbitrary power to levy taxes and special assessments on the property of others. *The petitioners named in the statute are authorized, absolutely and arbitrarily, to determine whether the improvement is necessary and shall be made.* No discretion, exercise of judgment, or revisory or supervisory control is vested in the board of county commissioners, or any other tribunal or officer elected by or responsible to the people. When the petition is presented to the board of county commissioners demanding the improvement of a road, it is, in the language of the statute, 'made the duty of such county commissioners to cause the same to be improved.' The county commissioners have no discretion to refuse the improvement. Here an important power, namely, that of causing public improvements, and of levying general taxes on all of the people, in addition to special assessments on a portion of them, to pay for such improvements, is conferred directly upon a class of persons, many of whom may not be electors. The petitioners are authorized, absolutely and arbitrarily, to fix the boundaries of the taxing district; the nature, extent and cost of the improvement to be made; and no officer or tribunal of the people has any discretion in this respect. The boundaries of the taxing district are fixed by the 'terminal points mentioned in the petition.' 'The points between which the improvements are to be made,' and 'the kind of improvements,' are determined by the petition." (Page 158.)

The same Kansas statute was also held unconstitutional by the United States Circuit Court in *Parks* v. *Board of Commissioners of Wyandotte County,* 61 Fed., 436. Judge Williams said:

"Self-taxation, or taxation by officers chosen by or answerable to those directly interested in the district to be taxed, is inseparable from that protection of the

right of property that is either expressly or impliedly guaranteed by all written constitutions, under our system of government. Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. If taxes may be forced on the people of a whole county, arbitrarily, by a few people signing a petition, it is plain that the people of the county, being the district to be taxed, have no voice in or control over the tax. There is no limit to the cost of these improvements, and the taxpayer is absolutely without means to check or control abuses that naturally follow arbitrary and irresponsible power over the property of others. The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property." (Page 438.)

It might have been, and doubtless was, claimed for this Kansas act that the petition of property-owners for improvement of the road was only a "fact" on the happening of which the statute itself became operative; but it was, like the action of the local legislatures of Michigan, more than a fact,—it was an exercise of discretion by the petitioners on legislative questions, viz., as Chief Justice Horton said, "the boundaries of the taxing district; the nature, extent and cost of the improvement to be made." (Page 158.)

In *Harward* v. *St. Clair, etc., Drainage Co.*, 51 Ill., 130, the court said, in condemning a delegation of taxing powers:

"The power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people, and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No person or class of persons can be safely entrusted with irre-

sponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses, by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and *imposed by persons acting under no responsibility of official position, and clothed with no authority, of any kind, by those whom they propose to tax,* it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering, by holding that *it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the 'corporate authorities' of the municipality or district to be taxed.* These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated." (Page 135.)

In *Central R. R. Co.* v. *State Board,* 49 N. J. L., 1, an act for taxation of railroads provided different taxes for "main stem" and for branches, and said that whenever there were several branch lines in one taxing district the assessors should designate one as main stem. (Page 10.) "This selection of a main stem," said the court, "is made at the will of this official body, uncontrolled by any legislative standard, and unguided by any peculiarity in the individuals of the class to be selected from, for they are in all respects alike." (P. 11.) Such power of selection was held a delegation of the power to tax, Chief Justice Beasley saying:

"But the present problem does not stand before us thus simply conditioned; the legislature has not itself declared which of these branches is to be selected as

main stem, but *has delegated the power to make such selection to the state board.* In other words, this body of officers is authorized to say which branch, out of three or more, shall be chosen as main stem, and shall thereby be exempted from a part of the tax to which the rest will be liable. *The legislature has not provided any standard by which the selection in question is to be made; everything in this matter being left to the unguided discretion of the designated officials.* It has been held in this court on several occasions that in the exercise of the taxing power *both the amount of the tax and the subjects to be subjected to it must be fixed by the legislature itself, or some standard must be provided by it whereby such matters may be plainly ascertained. Neither of such things can be left at large, to be decided by the judgment of any set of officers.*" **(P. 17.)**

(g) It has been argued for appellee at different times that the amounts of local taxes raised through the state are themselves facts upon which the statute makes its own operation depend; that the statute says that when the *fact* is that local taxes and the state tax on others than the corporations taxed under Ch. 173 are on the average at a particular rate, then the taxes under Ch. 173 shall be at the same rate. Calling the result of the legislative decision on local taxes a "fact," however, does not affect the real working of the statute. Every statute or legislative ordinance is a fact in the same sense. It is an actuality. But so would be the rate of tax named by any body of men, to whom the legislature might commit in terms the power to fix the state tax rate. Their decision, when made, would be "a fact;" but, none the less, their act of decision would be the exercise of legislative power to determine the state tax. The distinction between real *facts,* whose executive ascertainment may be made the occasion of a law's

operation, as in *Field* v. *Clark* or in the *Tea Inspection case,* and *acts* which, of course, also are facts when done, is plain enough. The local legislators of Michigan, in voting local taxes and so largely determining the amount of appellant's tax, *do not seek to ascertain and announce a condition or thing existing apart from, and independently of, their own action; on the contrary, they act creatively,*—they use their legislative discretion to decide a question of public (and private) policy, and the result of their action is the only fact. Every legislative act is a fact, in the same sense of being an actuality, from the time when it is done; but not before that, and not independently of its doing.

(h) Judge Wanty, in his opinion in the court below, disposed of this claim of delegation as follows:

"The only question is, did the Legislature fix it, or is it fixed by the determination of the various legislative bodies of the different taxing districts into which the state is divided? 'A rate ascertained as the result of that which is enacted may be regarded as authorized by law, as well as a rate declared in terms.' *Morton, Bliss & Co.* v. *Comptroller General*, 4 S. C., 477. The local legislative bodies, in determining the amounts to be raised by taxation in their respective jurisdictions, and the assessing boards, in placing a valuation upon the property to be taxed, do not fix the rate, under this statute, to be paid by the complainants. They fix the rate to be paid by their several constituencies who appointed them, and to whom they are responsible; and the state legislature, which is a body representing the complainants, fixes the rate at which the complainants are taxed to be the average rate placed on the other property of the state, which is ascertained by a mathematical calculation. The rates at which the respective communities are taxed are facts in the production of which the discretion of the officers and the needs of the various communi-

ties for which they act is certainly an element, but after the facts are produced, the legislature may take them for its guide in fixing a rate, as it may take any other fact which moves its discretion. If the legislature were to convene each year after the assessments throughout the state had been levied, and should use the assessment rolls of the various assessing officers for the purpose of ascertaining the average rate levied upon other property upon which *ad valorem* taxes are assessed, and assess the property of complainants at that rate, there could be no constitutional objection to the tax; and yet the rate will be the same, and it would be ascertained in exactly the same way, except that a committee of the legislature would do the clerical work of making the mathematical calculation, which, under the statute we are considering, is done by the State Board of Assessors."

Michigan R. R. Tax Cases, 138 Fed., 223, on p. 235; Rec., 839.

Three positions seem, therefore, to have been taken by the trial judge; and a word of answer to each is proper.

In the first place, the judge quotes from *Morton, Bliss & Co.* v. *Comptroller General,* 4 S. C., 477, the statement,—"A rate ascertained *as the result of that which is enacted* may be regarded as authorized by law, as well as a rate declared in terms." That is certainly true, in the absence of such constitutional provision as we have found in New York and Michigan, which requires tax laws to state the amount of tax directly, and not by reference. But, the trouble is that the average rate applied to appellant's property is *not* the result of what the state legislature has enacted. Who can determine the average-rate from the state statute, before the local legislatures

throughout the state have exercised their independent legislative powers? And how is the action of those local legislatures, in fixing the amount of taxes on which appellant's tax depends, controlled by any rule or principle furnished by the state legislature? The average-rate cannot be said to be the result of the action of the state legislature, unless the action of the local legislatures in prescribing the local taxes on which the average-rate chiefly depends can be said to be the result of the state enactment; and that is absurd.

In the second place, the trial judge said that "the rates at which the respective (local) communities are taxed are facts in the production of which the discretion of the officers and the needs of the various communities for which they act is certainly an element, but *after the facts are produced*, the legislature may take them for its guide in fixing a rate, as it may take any other fact which moves its discretion." Of this position it is enough to say, as already argued at sufficient length, that the tax-levying ordinances of the various local legislatures are not in a true sense facts, but *are legislative opinions and decisions on questions of policy.* In a sense, of course, a statute or any other legislative act is a fact; that is, it is an actual, existing thing, after the legislative act has been done. It is mere mental confusion, however, to forget, because both are actualities, the controlling difference between an independent legislative act (which levying taxes for the purposes of any community always is) and a fact, in the ordinary and true sense, which exists apart from legislative crea-

tion, and, therefore, may be executively or judicially determined. The distinction has already been discussed between a statute which makes its operation or application dependent upon real facts, to be ascertained by an executive or administrative official, and a statute which has no completeness before the independent and untrammeled action of other legislatures.

Finally, Judge Wanty says that it would be entirely allowable for the state legislature, *after* the various local legislatures in Michigan had levied their taxes, to adopt, for application to appellant's property, the rate resulting as an average from the various local levies. That is indisputable; but not this case. If in any year the state legislature ordered a committee, or anybody else, to compute and report the average of all tax levies in the state, and then ordered that particular average-rate to be applied to corporate property, it would, of course, itself have passed upon the propriety and justice of the particular rate adopted; but, under Act 173, the legislature orders applied to corporate property an average-rate whose amount the legislature cannot know, for it depends upon the independent legislative action of other bodies in the future. The difference may well be illustrated in this way: It is competent for the legislature to have a committee report to it what in the judgment of the committee is a proper rate of state tax, and then to adopt the rate recommended by the committee. On the other hand, it would be palpably a delegation of legislative power if the legislature were *in advance* to say that the rate of state

tax in a given year, or continuously from year to year, should be what its committee on taxation, or any other committee, should think proper. The difference between the two supposed cases is the same as the difference between the case Judge Wanty supposes and the actual case under Act 173.

(i) Thus far, the positive aspects of this delegation of taxing power to the local legislatures have been discussed, viz., that Ch. 173 allows those local legislatures to alter the average-rate by their own, independent legislative action; it is now desirable simply to recall its negative phases, as illustrated in the earlier parts of this brief, viz., that the state legislature itself has not considered and decided the two things which are essential parts of any law imposing state tax,—i. e., (1) how much revenue the state should have, and (2) what is a just apportionment of the burden of that revenue among its different contributors. (See Points I and IV, *supra.*)

(j) A word should be said about the cases of
Thomas v. *Gay*, 169 U. S., 264.
Wagoner v. *Evans*, 170 U. S., 588.

In these cases, statutes were sustained which allowed county authorities to tax for county purposes property situated within unorganized country, which was attached to the county for judicial purposes. Such decisions have no bearing upon the present case, for several reasons:

(1) They, of course, do not relate to the question whether the legislative power to tax has been delegated; they involve rather the questions whether, under the facts of the cases, the taxpayer was charged

by a non-representative legislature, or for the expenses of a government whose benefits he did not share.

(2) The pivotal facts were that the territory in which the taxed property was situated was not under any other local government than that of the county laying the taxes; and it was attached for judicial purposes to that county. Consequently, that territory became, as Justice Shiras said, "in effect a part of the county to which it was so attached." (Page 278.) The peace officers of the county; its courts; and, doubtless, the county officials, or many of them, acted for the attached territory. Justice Shiras said, too: "It is to be presumed that they (i. e., the people of the attached territory) have *a right to send their children to the schools* in the organized county." (Page 278.)

On the contrary, to use the situation of the North-Western Railway in the Upper Peninsula of Michigan again as an example, all of that railway is under local organization for the purposes of government; and it is impossible to say that it shares the benefits of local governments in the southern part of Michigan. The legislature fixes the area over which the benefits of a local government are supposed to spread when it defines the boundaries of that government's jurisdiction. A person put by the legislature under the government of one county, city, town, village or school district cannot be adjudged to share the benefits of the governments of other counties, cities, towns, villages and school districts.

(3) All persons and property in the unorganized

territory attached to the county, by the laws upheld in the two cited cases, were subjected alike to the county government and taxation. It cannot be said in the present case that the corporate property taxed under Act 173 is benefited by local governments within whose jurisdiction it does not exist, when no other property in Michigan—even though in the same place with the railroad—is held benefited by any local governments save those within whose jurisdictional boundaries it exists.

(4) Township taxes were *not* sustained, when levied upon property within the territory attached to the county. This was directly involved in *Wagoner* v. *Evans*. The court below had restrained collection of the township taxes (Page 589); both parties appealed; and this court reversed the court below as to county taxes, but affirmed as to township taxes. (Pages 592, 593.)

In Missouri, an average-rate law was sustained by the state court; but the statute was very different in scope and operation from that in hand, and the decision upon its validity will be found to have no argumentative value. Indeed, the points relied upon by appellant in the present litigation were hardly presented or considered. See,

In re Apportionment of Taxes, 78 Mo., 596.
State v. *Mo. Pac. Ry. Co.*, 92 Mo., 137.

Of the former of these cases, these things should be noted:

(1) The question involved was purely one of apportionment of the tax that had been collected from

the railroad. The tax-paying railroad was not a party to the controversy.

(2) The matter was one of school taxes only. They were unquestionably for governmental purposes; and there was no feature in the law, such as Act 173 contains, whereby a railroad is charged because of the taxes for purely private enterprises and investments of localities in which no part of the railroad is situated.

(3) The rate of tax, indeed, under this Missouri statute was "the average rate of taxation levied for school purposes by the several local school boards or authorities of the several school districts *through which each railroad runs.*" (Page 598.) Act 173, however, averages all local taxes everywhere in the state, without reference to the situation of the railroad.

(4) No question whether the taxing power had been delegated or whether the Federal Constitution had in any way been violated was presented to the court.

(5) The Missouri court treated the county as a unit, with reference to school taxes; and expressly said that the question would be far different if the statute had sought to affect the taxpayer in one county with the school expenses of another county. The court used this language: "If the legislature had authorized one county to levy and collect taxes upon property located in another, it would be an analogous case to that of the City of Weston, above referred to" (p. 599); reported in 22 Mo., 387, and holding that persons outside of a municipality cannot be taxed for its benefit.

In the latter case, *State v. Mo. Pac. Ry. Co.*, a question was made, in a general way, under the Fourteenth Amendment; but apparently without indication of specific fault. The court's entire utterance on the subject is as follows:

"Wherein said Section 12 of the Act of 1873 is in conflict with the above constitutional provision has not been made clear to us. It is certainly within the power of the legislature to authorize the imposition of taxes for school purposes on the property of defendant; and considering the nature of its property, and the fact as stated in 78 Mo., 596, 'that the road-bed is chiefly valuable as an entirety,' that its aggregate value is made up because of its continuity, that the portion of a railroad in a county, when considered as disconnected with a continuous line, in most cases would be of little or no value; considering these things in connection with the further fact that the rolling stock of defendant, constituting a large and valuable part of its property, cannot be localized in any one county, it being from its very nature constantly changing from one county to-day and another to-morrow,—we cannot say that said Section 12 is violative of the Fourteenth Amendment, inasmuch as, under the construction we put upon it, the average rate to be applied to defendant's property must not exceed the limit prescribed in the constitution. *In Re Apportionment of Taxes*, 78 Mo., 596, it is held that said Section 12, so far as it authorized the apportionment of school taxes levied and collected according to the mode therein prescribed, was constitutional. While the constitutionality of the section as to the mode prescribed for levying school taxes was not directly passed upon conclusively, that it is not obnoxious to the constitution follows as a corollary from what was decided." (Pages 155-156.)

Here we have the court's entire pronouncement. Its value needs little comment. No definite point of unconstitutionality seems to have been advanced. The claim was general. The court decides no definite point,

but answers generally. If anything was definitely considered, it seems to have been the question whether it was wrong to put unequal rates upon railroad property and other property; and that, of course, was decided rightly, but is altogether different from the questions in the present litigation.

VI.

Act 173 *deprives those taxed under it of opportunity to be heard concerning the amount of their tax before those who fix that amount, viz.,* (1) *the local legislatures of the counties, cities, villages, towns and school-districts throughout Michigan, and* (2) *the local assessors who value the property taxed ad valorem, throughout the state, under other laws than Act* 173.

The two branches of this question of hearing require separate treatment:

1. *As to hearing before the local legislatures.* It may be said that this aspect of the matter reduces to Point V, *ante,*—that the power of fixing the rate has been delegated to the local legislatures; for, if that power has not been delegated, and the rate is fixed by the state legislature itself, the persons taxed upon Act 173 had the opportunity to be heard about the rate by appearing before the state legislature when it was considering the enactment of the statute. Such a position, however, rests upon an artificial, rather than a practical and real, view of the situation; and even technically it must be abandoned if the power of fixing the rate from year to year has been delegated to the local legislatures.

The very unreality of the opportunity of those taxed under Act 173 to appear and contest before the state legislature the amount of tax to be imposed upon them is, in itself, a further and forcible argument to show that the power of fixing the "average-rate" has been delegated. How could any corporation taxed under Act 173 have argued before the state legislature, in the course of its consideration of the act, that the "average-rate" would be too high or too low, either for the state's needs or for just treatment of the corporate tax-payer in comparison with his neighbor in the same communities? As already argued, nobody (whether the legislature or the taxpayer) could tell what the rate in any year would be, because nobody could tell what local taxes Detroit, Kalamazoo, Marquette or any other municipality of Michigan would levy; and on the action of those municipalities would depend, not only what revenue the state would get, but also whether a railroad would pay a higher or a lower rate than its neighbors. It would have been nothing but futile for the railroad to argue before the legislature that Act 173 would tax it too much for the state's needs, or too much in comparison with others in the same places; for to any such argument it would have been fair reply,—"How do you know what the rate will be?"

The rule that a tax-payer is constitutionally entitled to a hearing on the amount of his tax includes the right of hearing on that point before the legislature. Such privilege is part of the general right of appearance before, or petition to, the legislature; which is part of the law of the land.

Cooley on Constitutional Limitations (7th Ed.), 497, 498.

2 Story on the Constitution, Sec. 1894.

This Court has declared:

"The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in reference to public affairs and to petition for redress of grievances."

U. S. v. *Cruikshank,* 92 U. S., 542, on p. 552.

The Constitution of Michigan itself re-enforces the right; providing that,

"The people have the right peaceably to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for the redress of grievances."

Michigan Constitution, Art. XVIII, Sec. 10.

Of which provision, the Supreme Court of the state says:

"This section gives, and was intended to give, to the people the *right to present their views to the legislature on any subject which is of legislative cognizance.*"

State Tax Law Cases, 54 Mich., 350, 382.

And, as already ruled by this Court, a tax-payer has the constitutional right to be heard before a Board of Commissioners, empowered to define a taxing-district on the *legislative* question what boundaries shall be given the district.

Fallbrook Irrigation District v. *Bradley,* 164 U. S., 112; 170, 174, 175.

This Court said:

"In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the

district. The legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the legislature, but, after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose. It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. *Paulsen* v. *Portland*, 149 U. S., 30, 41. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Merchant*, 125 U. S., 345, 356, and *Walston* v. *Nevin*, 128 U. S., 578. Such a hearing upon notice is duly provided for in the act." (pp. 174, 175.)

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324; 339-341.

The reasons for the distinction, in respect of notice and hearing, between action by the legislature itself

and action of a special board, in fixing the limits of the taxing district, are doubtless that everybody is bound to take notice of the legislature's sessions, and at its sessions everybody has the right to be heard through petition or otherwise.

Patently, the persons taxed under Act 173 have no right to appear before the county, town, village and school district boards, and the city councils, of the communities in which they have no property, and be heard on the subject of the local taxes to be raised. They are not members of those communities; they have no interest in the question which alone the local legislature does, or can, decide, viz., what local needs and policies call for; and the statutes of Michigan give them no right of such appearance and hearing.

2. *The necessity that a corporation taxed under Act 173 be given the right of hearing before the assessors throughout the state,* on the subject of the value and proper assessment of that property, is no less clear under the "average-rate" plan; and this necessity is plainly independent of the question whether the power of fixing the rate of tax has been delegated to the local legislatures.

The assessments made on property generally in the state determine directly, and equally with the amount of taxes paid on that property, the average-rate and consequently the amount of tax paid by appellant. *The taxes are the dividend; the assessments are the divisor; and the quotient is the average-rate.*

The action of the assessors, in fixing the value of property generally, is executive work. Its nature and

its consequence to appellant are the same as in the case of ordinary taxation, when the legislative body enacts that a fixed amount (as distinguished from a fixed rate) of tax be collected on the value of property in the taxed district. If the rate of tax is named by the legislature, the only assessment in which any particular taxpayer is interested is that of his own property; but when the tax is ordered in a fixed amount (*e. g.*, $1,000,000), each taxpayer is interested in all the assessments, because the aggregate of all assessments determines the rate applied on each assessment.

The right of a taxpayer to be heard on the assessment of his property is fully established.

> Cooley on Taxation (3d Ed.), 626.
>
> *Hagar* v. *Reclamation District*, 111 U. S., 701, 710.
>
> *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S., 526, 535.

The reasons for this right are: (1) On the assessment depends his tax, and (2) the assessment is a decision by executive officers on a question of fact which the action of the legislature, in fixing the amount or rate of tax, has not determined. The assessment, therefore, is an act on which his tax depends, about which the taxpayer has had no previous opportunity for hearing, and about which no decision has been made for the taxpayer by a representative legislature.

All these reasons apply in support of the claim of those taxed under Act. 173 that they should have a right of hearing before all the assessors of Michigan. Those assessments determine the tax; they are executive acts, —decisions by executive officers of questions of fact

(*i. e.*, the value of different properties)—and the legislature itself, of course, has not passed on the assessments.

Under ordinary *ad valorem* tax laws, any taxpayer has the constitutional right (if the *rate* of tax has not been named by the legislature, but is left to result from division of the amount of tax, ordered by the legislature, by the total assessment) to be heard on assessments generally.

> *Cooper* v. *Board of Works*, 108 Eng. C. L. R., 181. (Especially language of Wells, J., and Byles, J., as quoted in 13 Fed. Rep., on page 765.)
>
> *Dundee Mortgage Co.* v. *Charlton*, 32 Fed., 192.
>
> *State* v. *Randolph*, 25 Dutcher (N. J.), 427, 431.
>
> *State* v. *Dodge County*, 20 Neb., 595, 600.
>
> *State* v. *Edwards*, 26 Neb., 705.

The cases holding that a taxpayer may attack his tax in court because the property of others is fraudulently assessed too low, or is fraudulently omitted from assessment, recognize and are founded on the interest of each taxpayer in all the assessments that fix the rate of tax. The restriction of his privilege of judicial attack to cases of fraud on the part of the assessors can exist only because the taxpayer may be heard before the assessor, and so is bound by his decision, if honest.

Indeed, a right of hearing before the proper body seems necessary concerning any act whose effect is to take property.

> *Alexander* v. *Gordon*, 101 Fed., 91; 96-98.
>
> *In re Rosser*, 101 Fed., 562.
>
> *Lamb* v. *Powder River Live Stock Co.*, 132 Fed., 434.

And, especially, it is to be borne in mind that *the work of the assessors, throughout the state, has an importance in its effect upon appellant's tax, that is both far greater than, and different from, the effect of the work of assessment in ordinary ad valorem taxation.* Under Act 173, the action of the local assessors everywhere fixes the amount of state tax paid by appellant *without any check or restraint thereon by action of the state legislature.*

The legislature neither fixes the absolute amount of tax to be raised for the state in any year, nor fixes the rate of tax for state purposes. *Both are left to depend, without legislative control, on the assessments.* In ordinary *ad valorem* taxation, the legislature itself fixes the absolute tax or the rate of tax. In the former case, the assessments determine only the distribution of the tax among its several contributors, and do not at all affect the amount of taxes raised by the state. If assessments are low, the rate becomes high; if they are high, the rate becomes low; the amount of the tax remains invariable, as the legislature fixed it. In the latter case (where the legislature fixes the rate of tax), it is true that the assessments influence the amount of the state's revenue, *but only as one factor* which operates upon the amount of the state's revenue in a way fixed by the legislature itself, viz., by application of the rate which the legislature has itself determined. *Under Act* 173, *on the contrary, no element is contributed by the legislature to control the tax.* The things on which it depends are (1) the aggregate *ad valorem* taxes paid by property generally in the state, which are fixed by local communities and their officials, and which may go to any amount they determine, and (2) the as-

sessments. *The action of local legislators and of assessors is permitted to charge appellant without the slightest check.*

And this feature of the statute becomes of peculiar import when we consider that *all but appellants gain by the general habit of low assessments; and gain proportionately to the amount of the under-assessments; appellants under the ingenious devices of Act* 173 *are hurt by that habit, and proportionately to the amount of the general under-assessments.* It is not too much to say (for it has a warrant in the statute's own physiognomy) that this practical feature was a large motive to the adoption of the statute.

If a tax is imposed upon general property in a given amount, either by the state legislature or by a local legislature, low assessments and consequent high rates do not hurt the payers of that tax, so long as assessments are relatively equal; but indirectly such low assessments benefit the general taxpayers because appellants are compelled in consequence of such low general assessments to pay more tax to the state, with the result that the state will need to raise less state tax, *pro tanto,* from others than appellants. If the tax laid upon general property be one for which the rate is fixed by the legislature, the taxpayers generally profit still more from low assessments; because then they pay less tax directly under that rate, and beside they get the same indirect benefit as in the other supposed case through increase, in consequence of the low assessments, of the portion of state taxes which the corporations must pay under Act 173.

SECOND. UPON THE QUESTION WHETHER ACT 173 DENIES TO THOSE TAXED UNDER IT THE "EQUAL PROTECTION OF THE LAWS," IT IS SUBMITTED:

I.

The phrase "equal protection of the laws" remains, like "due process of law," undefined in any complete way. Perhaps it is susceptible of easier general definition; but the courts have followed in reference to it, as concerning "due process of law," the wiser and judicially natural course of applying the phrase to each case on its own facts.

Many illuminating and fertile descriptions of the phrase have been given. Some of the leading ones are here mentioned.

Justice Matthews said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*"

Yick Wo v. *Hopkins*, 118 U. S., 356, on page 369.

Justice Field said that the Fourteenth Amendment "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like cir-

cumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in

its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment."

Barbier v. *Connolly,* 113 U. S., 27, on pages 31 and 32.

The same great judge said, in the celebrated California Tax Cases, these things:

"The concluding clause of its first section was designed to cover all cases of possible discriminating and partial legislation against any class, in ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens."

County of San Mateo v. *Southern Pac. Ry. Co.,* 13 Fed., 145, on page 150.

Again:

"The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms,—in his life, his liberty, his property, and in the

pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at 1 per cent. on the value of his property another at 2 or 5 per cent., or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property."

Railroad Tax Cases, 13 Fed., 722, on page 733.

Justice Bradley said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and *reasonable ways.* It may, if it chooses, exempt *certain* classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different *specific* taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, *so*

long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. *But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.* It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S., 232, on page 237.

These declarations of the most eminent judges, which, too, have been recognized at all times in this court as sound, indicate a few central things with great clearness; and among these things, I think, may be named:

1. Persons are within the equal protection of the laws as to taxation.

2. While the legislature in imposing taxes may exercise a wide discretion, in subjecting property to different forms and amounts of taxation, *that discretion must rest upon a reasonable basis* and the dis-

criminations made by the legislature in taxation of different sorts of property *must not be arbitrary, in the sense of resting upon no fact that affords a just ground for such course.*

3. No more in taxation than in other fields of legislation are any persons to be deprived of those things that are most fundamental in our government, *and are always essential to any real protection of the government's subjects,* such as the decision of legislative questions by a popular and representative legislature; the right of appeal to the courts on questions of judicial character; opportunity for hearing before either the legislature or the court that determines the subject's rights; and the avoidance in all fundamental ways of such things as, in Justice Bradley's words, "are of an unusual character, unknown to the practice of our governments."

It has often been said by the courts, and is of course true, that no tax law can operate, in its actual application to the complicated facts of life, with absolute or mathematical equality. It is enough that the law fairly and honestly tends to a real equality, though its application may somewhat fall short of that object. *But it will not do for a tax law directly and necessarily to tend to inequality*—at least of a kind that is unmistakably unreasonable and unjust. That is no less thoroughly established than the extensive discretion of the legislature, as Justice Bradley also said, "within reasonable limits and general usage."

Justice Brewer declares:

"It has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized

in that clause of the Fourteenth Amendment which prohibits any State to deny to any individual the equal protection of the laws. That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. *But that inequality is something which it is impossible to foresee and guard against*, and therefore such resultant inequality in the operation of a law does not defeat its validity."

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S., 79, on page 110.

"Equality in right, in protection and in burden is the thought which runs through the life of this Nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality. But when a tax directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification."

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S., 283, on page 301.

And of this Justice Field likewise spoke:

"Unequal taxation, *so far as it can be prevented*, is therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are and always will be more or less inequalities in the operation of all general legislation arising from the different conditions of persons, from their means, business or position in life, against which no foresight can guard. *But this is a very different thing, both in purpose or effect, from a carefully devised scheme to produce such in-*

equality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable; but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions and the cause of more commotions and disturbances in society, of insurrections and revolutions than any other cause in the world."

County of Santa Clara v. *Southern Pacific R. Co.*, 18 Fed., 385, on page 399.

In another place, Judge Field said:

"Absolute equality and uniformity may not be attainable in practice, but an approximation to them is possible, and any plain departure from the rule will defeat the tax."

Railroad Tax Cases, 13 Fed., 722, on page 734.

The power of the legislature, in establishing different methods of taxation for different persons and property, is that of classification, and such power is recognized on all hands; but the extent of the power depends upon the meaning of classification. The right to classify is not the right to act arbitrarily, or to deprive persons of the most fundamental sorts of protection accorded to persons generally. *Classification means only the division of persons or properties into different classes on some basis or principle that, from its own nature and from the nature of the persons or properties classified, affords a reasonable and just*

ground for the different treatment of the different classes. This likewise is amply established in the decisions.

Justice Brewer said:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet *it is equally true that such classification cannot be made arbitrarily.* The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. *That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.*"

Gulf, Colorado & Santa Fe Ry. v. *Ellis,* 165 U. S., 150, on page 155.

Again,

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins,* 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary pow-

er.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

(*Id.*, page 159.)

After citing numerous authorities illustrating unreasonable classifications, Justice Brewer concluded:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification —and is not a mere arbitrary selection."

(*Id.*, page 165.)

A few other statements of this plain idea may be permitted:

"The basis of classification must be natural, and not arbitrary."

Judge Baxter, in *De Brell* v. *Morrissey's Heirs*, 15 S. W. Rep., 87, on page 95.

"The section of the code under consideration (1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee not to exceed twenty dollars. A law which would require all farmers who raise cotton to pay such a fee in cases where cotton was the subject-matter of litigation and the owners of this staple were parties to the suit would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians or merchants or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights of every state constitution of the various commonwealths of the American Government."

Clopton, J., in *South & North Alabama R. R. v Morris*, 65 Ala., 193, 199, *et seq.*

"But classification for legislative purposes must have some reasonable basis on which to stand. It must be evident that differences, which would serve for a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons may be deemed competent to contract for themselves, but no one will claim that competency to contract may be made to depend upon nature or color of the hair. Such a clasification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land."

State v. Loomis, 115 Mo., 307, on page 314.

For other cases illustrative of the proposition—that classification must be guided by a principle that reasonably leads to different treatments of the established classes *in that particular respect in which they are differently treated,* see—

Wilder v. *C. & W. M. Ry. Co.,* 70 Mich., 382, 384.

Lafferty v. *C. & W. M. Ry. Co.,* 71 Mich., 35.

Park v. *Free Press Co.,* 72 Mich., 560, 566, 567.

Grand Rapids Chair Co. v. *Runnells,* 77 Mich., 104.

San Antonio, etc., Ry. Co. v. *Wilson,* 19 S. W., 910 (Tex.).

Millett v. *People,* 117 Ill., 294.

Frorer v. *People,* 141 Ill., 171.

Eden v. *People,* 161 Ill., 296.

City of Janesville v. *Carpenter,* 77 Wis., 288, 302.

Durkee v. *Janesville,* 28 Wis., 464.

State v. *Goodwill,* 33 W. Va., 179.

State v. *F. C. Coal & Coke Co.,* 33 W. Va., 188.

Pierson v. *City of Portland,* 69 Me., 278, 281.

State v. *Hame,* 61 Kas., 146, 152, 153, 154.

This fundamental requisite of classification, viz. that it must have an underlying principle, which grows out of the real nature of things—and not merely out of an arbitrary legislative desire—and which leads reasonably to the different treatments that the legislature prescribes for the different classes, constitutes a particular aspect of, and affords one of the best tests

for applying, the rule of equal protection under the laws which the Fourteenth Amendment contains.

This Court has even gone to the length of declaring that the equality of all before the law which the Fourteenth Amendment requires is inherent in a republican form of government. Chief Justice Waite spoke for the court when he said:

"The Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the constitution against another. *The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.* That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guarantee."

U. S. v. *Cruikshank,* 92 U. S., 542, on page 554.

While the questions presented in the present suits have none of them been passed on by the state courts, it illustrates and re-enforces the independent authority and the direct obligation of the federal government to see that things guaranteed by the Fourteenth Amendment are not taken away, that the federal courts are not bound, in considering questions under the Fourteenth Amendment to accept the view of the nature or

effect of a state statute which may have been taken by the state courts.

Yick Wo v. *Hopkins,* 118 U. S., 356, 366.

A., T. & S. F. R. R. Co. v. *Matthews,* 174 U. S., 96, 100.

II.

Undoubtedly the "equal protection of the laws" has a wider scope than "due process of law". A thing that is so lacking in the more fundamental elements of justice as not to be due process of law can hardly be believed ever to give the equal protection of the laws; unless, indeed, in the single instance where the due process of law is denied to all in the state. On the other hand, the equal protection of the laws may often be denied to some persons, through refusal to them of some safeguard or right that is accorded to others and is of sufficient importance to make its denial to some, while it is granted to others, an unreasonable and hostile discrimination, even though that thing is not indispensable to due process.

As was said by Justice Field in the California tax litigation:—

"With the adoption of the amendment the power of the states to oppress any one, under any pretense or in any form, was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be

subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his associations with others, either for profit, improvement or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body or to a religious society or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed government holds at all times over every one, man, woman and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty or the property of any person, however humble his lot or exalted his station, without due process of law; and no state *even with due process of law* shall deny to any one within its jurisdiction the equal protection of the laws."

County of Santa Clara v. *Southern Pacific R. R. Co.*, 18 Fed., 385, on page 398.

If the equal protection of the laws be not a guarantee of other and wider nature than due process of law, there was no occasion for inserting both in the constitution; and it is obvious, therefore, that the former is not to be reduced in meaning to the latter.

The arguments made in the former parts of this brief, devoted to due process, naturally bear again concerning equal protection; but it will be neither necessary nor proper to repeat them. Points III-VI following, if independently presented, would involve most all that is said under Points I-VI about due process. We ask the Court's reapplication here of what has preceded; in remembrance always of the fundamental con-

sideration that, whether or not the many novel and unjust features of the statute's operation make it fall below due process, they deny equal protection of the laws if they deprive appellants of the full, genuine benefit of protective principles which, in England and America, have always been recognized as of the largest practical importance.

III.

The taxes (state or local) of all persons in Michigan but appellants and the other corporations taxed under Act 173 *are voted with reference to, and in such amount as is deemed necessary to meet, the needs of the community that pays the taxes, and is to receive them;* but appellants' taxes are of an amount fixed, as the average-rate idea openly confesses, with reference to the expenses, both public and private, of other governments than the state, viz., all the counties, cities, villages, towns and school districts in Michigan, notwithstanding the fact that appellants have property in but a part of them.

Most briefly, it may be said again that when the legislature orders a certain amount of tax—however large—*without stating* that it is to depend upon, or bear any proportion to, anything else (or even stating what has determined the legislative decision)—there is, of course, no possibility of a court's saying that the legislature has considered anything that it should not consider; but when, as in this act, the tax which the the legislature orders is made *explicitly* to depend upon, and be controlled by, the taxes of other governments, *then* a court has no option but to say that the amount

of the tax is ordered—not because the legislature considers that the state's needs are proportionate to the needs of the other governments, whose local taxes are taken as a determinant—but *because the legislature seeks to equalize the burdens of different classes of taxpayers for different governments, and for different private and local enterprises,*—making appellants pay more state tax than others if, and proportionately as, those others pay more local taxes, and, on the other hand, making appellants pay less state tax if, and proportionately as, others pay less local taxes; without any reference to the question whether appellants share the benefit of the local taxes or not.

Again the questions are pertinent: *Why not as well permit appellants' taxes to be made of such amount as will meet the needs of any other government, outside of Michigan; for example, Ohio or Wisconsin? And, especially, why not as well permit appellants' taxes to be made of such amount as will equal the expenditures of private corporations, such as gas companies, water companies, street railway companies, etc., doing a business of a quasi-public sort in Michigan, and having property that is no more private than investments of the same kind by municipalities?* Can the determination of taxes on such a principle in the case only of corporations taxed under Act 173 be held to afford the equal protection of the laws?

IV.

Further, *concerning the question of just distribution of the burden of the state's support, among those who are subject to it,* when the legislature, in any ordinary taxing act, orders a certain amount or rate of tax to be paid by one class of its citizens,—*without saying more*—there is no possibility of a court's saying that the legislature has adjusted relative taxes in any other purpose than to make the different classes of taxpayers contribute in ratios that the legislature deems a just apportionment of the burdens of the government which lays the tax—or (at most) of the governments, state and local, whose benefits the taxpayer shares; but such a view of Act 173 is impossible, because it *palpably and directly* orders that there shall be a parity of tax, on a given amount of property, between what appellants pay the state and what others pay both to the state and their respective local governments, *including all those local governments of Michigan whose benefits appellants do not share.* Therefore, the unavoidable question comes: Is it "*equal protection*" of the laws to make appellants, *alone* of all the persons and property in Michigan, pay taxes that result—not from what the legislature thinks just between persons and property in the same places and under the same governments,—but from a relation of parity with the taxes on persons and property in other places, whose local governments appellants do not share?

It will be remembered that this plan has two striking consequences:

(1) The rate on railroad property in one year may

well be more than the rate on other property in the same places, and the next year the exact reverse be true; it thus clearly appearing that *the legislature utterly disregards, and makes no attempt to prescribe, the relation between the taxes of appellants and of others in the same places* and under the same governments. Indeed, in *the same year* one railroad is taxed on its property less than is paid on other property in the same places; while the reverse is true of another railroad. It all depends on the relation of local taxes in different parts of the state.

(2) Appellants are really taxed *for the relief* of others from a part of the expense (public and *private*) of their respective local governments, though appellants have no property under the jurisdiction of those governments. This has already been argued at length. (See Points II, III and IV, under due process.) *Why not as well tax appellants directly for the support of local governments where they have no property whatever? And, why not as well tax railroads for the relief of purely private companies operating water works, gas works, street railways, etc., as tax them for the relief of the inhabitants of municipalities (in which appellants have no property) from the expense of like private investments?*

When corporations taxed under Act 173 are the only persons in Michigan taxed after such principles and with such results as are imbedded in the plan of equalizing the taxes of persons living under different governments, are appellants given the equal protection of the laws?

Attention may be given here to the New Jersey

Railroad Tax law, which was first held unconstitutional by the Supreme Court of New Jersey (*Central Railroad Company v. State Board of Assessors*, 48 N. J. Law, 1), but was afterward held valid by the Court of Errors and Appeals (48 N. J. Laws, 146). The provisions of this statute are given in the former opinion by Chief Justice Beasley and in the latter by Chancellor Runyon. Without repeating here the full details of the statute, these significant things should be noticed:

(1) A "main stem" one hundred feet wide, including main track, was valued by itself, and its assessment with that of personal property and of the company's franchise was subjected to a tax, *fixed by the legislature itself*, of one-half of one per cent. for state purposes.

(2) The railroad real estate, outside of the "main stem" strip, was valued by itself and its assessment *subjected to the local rates of tax in the places where it was situated.*

(3) It was carefully provided by the statute that, in the language of Chancellor Runyon:

"If the amount of the state tax and local rate, as limited in the act, combined, exceed the amount which the company would have to pay if assessed at and required to pay full local rates alone, then they (*i. e.*, the state board of assessors) shall reduce the whole tax which the company would be required to pay to the last mentioned rate; and, in order to ascertain that amount (but for no other purpose), they may apportion the value of the franchise among the local taxing districts." (p. 272.)

(4) The tax paid at local rates upon the real estate

outside of "main stem" was allotted to the local communities where that real estate was situated.

It thus appears that this New Jersey statute had no average-rate feature, but, on the contrary, applied to the "main stem" a tax of one-half of one per cent. only, which was fixed by the legislature itself; and that, instead of making it possible to tax any part of the railroad at a higher rate than if it were taxed under local rates like other property, the statute carefully provided that even the stated rate of one-half of one per cent., fixed by the legislature, should be reduced, if necessary to bring about the result that the railroad property should pay no more tax than if taxed in ordinary fashion. This statute is so far from affording any precedent for the Michigan statute, that, on the contrary, it emphasizes that a fair tax law should be quite the opposite of Act 173.

Nor is it necessary to go to the length of Act 173, or resort to its curious devices, in order to accomplish the purpose, if the legislature should deem that expedient, of having all the railroad tax go into the state treasury. That result could be accomplished most easily, on lines of procedure already followed in the Illinois and Indiana railroad tax laws; by a process such as this— (a) assess the railroad as a whole; (b) apply the state rate of tax to this whole assessment and pay the result into the state treasury; (c) apportion the aggregate assessment to the local communities on track mileage or other legitimate basis for estimating the parts of the railroad's value in the different communities, as is done in the Illinois and Indiana laws; (d) apply to the apportioned assess-

ments the local rates in the respective communities; (e) pay the result of application of local rates to the locally apportioned assessments into the state treasury. Of course, too, the entire railroad tax could be carried directly and easily into the state treasury by a specific tax, such as Michigan so long had before the enactment of Act 173.

V.

All persons in Michigan except the corporations taxed under Act 173 *are given the benefit and protection of having the amount of their taxes fixed by a legislature whose members represent, and are responsible to, the community that is taxed;* but that fundamental protection is denied to appellants.

1. I assume here, of course, that it has been shown that the amount of taxes levied upon corporations under Act 173 is not fixed by the state legislature, but results from an independent discretion of the various local legislatures throughout Michigan who largely determine the aggregate of taxes used in determining the average-rate of tax applied to appellant's property. The previous discussion of that point need not be repeated.

What remains to be said under the present head is to show that, even if the determination of the amount of appellants' taxes otherwise than by a representative legislature is due process of law, it assuredly is not equal protection of the laws. The one great and fundamental security against oppressive taxation is that the legislature which determines the tax be

responsible to the community that pays the tax. This idea is central in the American system. The greatest judges have invariably recognized it. I will not repeat here the quotations made in the first part of this brief on the subject, but I give again here the leading references.

Ch. J. Marshall, in McCulloch v. *Maryland,* 4 Wheaton, 427.

Providence Bank v. *Billings,* 4 Peters, 514, 563.

Judge Cooley, in *Board of Park Commissioners* v. *Detroit,* 28 Mich., 227, on pages 244, 245 and 247.

Ch. J. Campbell in *S. C.,* 28 Mich., 228, on pages 249 and 250.

People v. *Hurlbut,* 24 Mich., 44; Judge Christiancy on pages 64-66; Ch. J. Campbell on page 89; Judge Cooley on pages 97-110.

Still other references will be found in the first part of the brief. They all emphasize, if that be necessary, the absolute importance of representative legislation in imposing taxes. When all persons in Michigan but the corporations taxed under Act 173 have the amount of their taxes fixed by a representative legislature, can it be equal protection of the laws to take that fundamental safeguard away from the appellants?

2. The descriptions of what the equal protection of the laws requires under the Fourteenth Amendment, given above, nearly all state, and none of them deny, that it includes the right of resort to the courts on equal terms concerning all judicial questions; and it

has been directly decided that this privilege is essential even to due process of law.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota,* 134 U. S., 418, 456, 457.

Can the right of the people to tax themselves, through their representatives in a legislature chosen by the community that pays the tax, be of less moment to the persons who dwell or have property in a state than the opportunity to resort to the courts for determination and assertion of their civil rights?

3. Viewing the matter as one of classification, how does it stand?

The property of railroad corporations and of other corporations enumerated in Act 173 is separated as a class by itself from the property of all other persons in Michigan for the purpose, or at least with the result, of denying to appellants the protection of having their taxes fixed in amount by a representative legislature; while, on the other hand, that protection is accorded to all others. Is there anything in the nature of the business or the property of railroads and of the other corporations enumerated in Act 173 that affords a reasonable basis for treating them differently from all others in Michigan in respect of this fundamental matter of representative taxation? Let it be remembered, as the citations already given show and as common sense and common fairness make plain, that classification for the purpose of different kinds of treatment must rest upon a principle that reasonably justifies such different treatment as grows out of the classification.

4. By any of the tests of "reasonable limits," or "general usage," or being "unknown to the practice of our governments," suggested by Justice Bradley's language in the case of *Bell's Gap R. R.* v. *Pennsylvania,* 134 U. S., 232, 237, the denial by Act 173 to appellants of the protection of representative taxation, which is accorded to all others in Michigan, is quite insupportable.

5. The denial of government in legislative matters by a representative legislature is in reality taking a part of the persons and property in the state that are under the protection of the Federal Constitution out of the operation, and putting them beyond the benefit, of the most fundamental idea of free government.

VI.

The protection of a hearing upon the amount of their tax, which is given to all others in Michigan, is denied to appellants by Act 173.

How the average-rate plan deprives appellants of hearing,—either before the state legislature, in any effective way, because when it passed Act 173 nobody could tell anything about the rate; or before the local legislatures, who really make the rate, through their independent levies of local taxes; or before the assessors of general property, whose executive action, in a peculiar and unchecked way, likewise determines the rate—has already been sufficiently discussed. (Point VI, under due process.) The fact that all others have the privilege of hearing, both before the legislature and before the assessors who determine their taxes,

is undeniable. The vast importance of the difference of treatment is sufficiently illustrated by the care with which the Michigan Constitution itself provides for legislative hearing. (*Art. XVIII, Sec.* 10; *State Tax Law Cases,* 54 Mich., 350, 382), and by this court's own decisions already cited.

VII.

An elaborate system of equalization of assessments is provided by the Michigan Constitution and statutes for the protection of all but the corporations taxed under Act 173. By amendment in 1905 (Act No. 282, Secs. 13 and 14), the state board of assessment has been empowered to equalize their assessments under Act 173 with the assessments of other property generally in the state; *but before* 1905, *and as to the taxes in suit, appellants were denied that protection.*

This point will be treated so fully by Mr. Hanchett, with reference to the elaborate statutory provisions of Michigan which show the discrimination against appellants and enforce its importance, that it need not be discussed further here.

VIII.

Act 173 *applies only to property owned by corporations of the kinds enumerated in the act and does not apply to property of the same kinds owned by natural persons and used by them in the same kinds of business.*

1. The fact is undeniable. The title of the act

is "An Act to provide for the assessment of the property of railroad *companies,* union station and depot *companies,* express *companies,* car loaning *companies,* stock car *companies,* refrigerator car *companies,* and fast freight line *companies*; and for the levy of taxes thereon by a state board of assessors, and for the collection of such taxes." Section 4 requires the state board to make an assessment of the property "of railroad companies, union station and depot companies, express companies, doing business within this state, car loaning companies and refrigerator and fast freight line companies and all *other* corporations owning, leasing, running or operating any freight, stock, refrigerator or any other cars." This section, therefore, itself interprets "companies" to mean corporations. Section 5 says, "The term property as used in this act shall be deemed to include all property, real or personal, *belonging to the corporation* subject to taxation under this act, including right of way, roadbed, station, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switchboards and all other property used in carrying on the business *of said corporations,* or owned by them respectively." This proviso of the same section excepts from the act the real estate that is "owned and can be conveyed *by such corporations* under the laws of this state, which is not actually occupied in the exercise of their franchises, or in use in the proper operation of their roads or their *corporate business.*" Finally, and emphatically, this same section 5 declares:

"The term company, corporation or association, wherever used in this act, shall apply to and be

construed as referring respectively to any railroad company, union station and depot company, express company, car-loaning company, or refrigerator or fast freight line company, and any and all *other corporations*, subject to taxation under this act'';

and then goes on,—

''The term 'property having a situs in this state' shall include all the property, real and personal, *of the corporations* enumerated in this act.''

Section 6, which requires returns of property for assessment (and is the only section on that subject), says that ''the *several corporations* enumerated in this act'' must make the returns. No doubt is left about the matter; but, if there could be doubt on the language of the act itself, it would be removed by the language of the constitutional amendment, by virtue of which this statute was passed (and but for which it would at once be unconstitutional; *Pingree* v. *Auditor General,* 120 Mich., 95); viz. ''The legislature may provide for the assessment of the property of *corporations* at its true cash value by a state board of assessors and for the levying and collection of taxes thereon.'' (Art. XIV, Sec. 10.) It is only *corporate* property that the Michigan Constitution permits to be taxed after the fashion of Act 173.

2. The question comes, then—and it is one of the fundamental questions in this case—can property of the same kind, used in the same kind of business, be taxed in different ways and at different rates, according to the single fact whether it is owned by a corporation or by natural persons (either individually or in partnerships or in joint stock associations)?

This question apparently has never been decided directly by this court. The reason doubtless is that

seldom—and perhaps never except by the California Constitution, passed upon in the Railroad Tax Cases,—has an attempt been made to base different taxation in a direct and unmistakable way on the mere corporate or unincorporated character of the owner. What this court has decided, however, concerning the necessity of a reasonable basis for classification, which affords a legitimate support for differences of treatment, such as are actually made, and concerning particular examples of classification lacking such a reasonable basis, is amply sufficient to cover the point; as we shall later see. And the question now in hand was directly and emphatically decided by Justice Field and Judge Sawyer in the California Railroad Cases.

> *County of San Mateo* v. *Southern Pacific Ry. Co.*, 13 Fed., 145.
>
> *Railroad Tax Cases*, 13 Fed., 722.
>
> *County of Santa Clara* v. *Southern Pacific Ry. Co.*, 18 Fed., 385.

The whole question was fully considered by Justice Field (see particularly pages 405-409); and by Judge Sawyer (see particularly pages 429-440). These extracts are worthy of immediate quotation.

"All property of railroad corporations, whether used in connection with the operation of their roads or entirely distinct from any such use, is estimated without regard to any mortgages thereon, while the property of natural persons is valued with a deduction of such mortgages.

Of the property of the railroad company,—the Southern Pacific,—several million acres of farming lands are included in the same mortgage which covers roadway, roadbeds, rails, and rolling stock of the company. No distinction is made in the assessment of the value of any of this property because of the

use of it. The whole is assessed in the same manner without regard to the mortgage thereon; and the taxes on the whole of it thus assessed, with the exception of the taxes on the roadbed, roadway, rails, and rolling stock, have been paid by the companies or parties to whom, since the levy, certain parcels have been sold. The discrimination between the railroad companies and individual proprietors, in the estimate of the value of their property, is made because of its ownership, and not from any specific differences in the character of the property, or in the specific uses to which it is applied.

The farming lands held by the company are not different in character from adjoining farming lands held by natural persons, yet they are assessed, under the system established by the constitution of the state, upon different principles. The roadbed, roadway, rails and rolling stock of the railroad companies are not different in their nature or use from the roadbed, roadway, rails, and rolling stock owned in many cases by natural persons, yet they are subject to a different rule of assessment. It is not classifying property to make a distinction of that character in estimating its value as a basis for taxation. It is making the amount of taxation depend, not upon the nature of the property or its use, but upon its ownership. And if this can be done, there is no protection against unequal and oppressive taxation. As justly observed by Mr. Edmunds, in the *San Mateo case:*

'If you once concede the point that you may classify different rates upon the values of things, or may put up your values on different principles, as values by deduction or otherwise,—which is the same thing stated in another way,—then there is no check upon the exercise of arbitrary power. The mob or commune that can get possession of the state legislature for one term may despoil every one of the citizens whom it chooses to despoil, and the liberty and the security of the Constitution of the United States, secured through painful exertion and great consideration, crystallized in unmistakable language,—historic, indeed, and bene-

ficent as it is historic, securing national intrinsic rights everywhere and to everybody,—will turn out to be an utter sham and delusion.' "

(18 Fed., 408, 409.)

"The discrimination is made against the company, for no other reason than its ownership."

(18 Fed., 394, 395.)

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value,—at a half or a quarter of it,—and the property of another at more than its value,—at double or treble of it,—according to the will or caprice of the state. To-day, railroad companies are under its ban, and the discrimination is against their property. To-morrow it may be that other institutions will incur its displeasure. If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the state, by a change of its constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill companies, of mining companies, indeed, of any corporate companies existing in the state. The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the state constitution would effect this if the federal constitution does not forbid it. Any difference between the owners, whether of age, color, race, or sex, which the state might designate, would be a sufficient reason for the discrimination. It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of property could vary according as the owner is white, or black,

or yellow, or old, or young, or male, or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny and has never been done except by bad governments in evil times, exercising arbitrary and despotic power."

(18 Fed., 395, 396.)

"Classification should have reference to the different character, situation and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation or circumstances of the property. Should second mortgagees foreclose a mortgage on a railroad or other property of a 'railroad or other *quasi* public corporation,' and a natural person become the purchaser of the road, or other property subject to the prior mortgage, at the next annual assessment the amount of the first mortgage bonds, or indebtedness secured, would be deducted from the value of the road or other property, and the amount of the bonds or other indebtedness assessed to the

mortgagees. Such, also, would be the result in the case before supposed, if C.—a railroad or other *quasi* public corporation—should convey its land to a natural person subject to the mortgage to B.; and although there would be no change in the condition, circumstances, use, or value of the property,—the change being only in the owner,—C.'s grantee would only be required to pay one-half the amount of taxes which C. had been compelled to pay, and B., who before paid nothing, would be required to pay the other half. Should the Southern Pacific Railroad and its lands pass into the hands of a natural person, upon a foreclosure and sale under a second mortgage, subject to the mortgage now on them, the value of this very security would be deducted from the value of the property at the next annual assessment. Thus, although the property would in all respects be the same, and similarly situated, and applied to the same uses, for natural persons, as well as corporations, may own and operate railroads,—a mere change in the ownership would require and effect an entire change in the mode and basis of the assessment, and the amount of taxes levied on the owner. Nothing it seems to me, could more clearly demonstrate the unsoundness of the proposition that only an admissible classification of property for the purposes of taxation is involved in the different schemes provided for taxing the property of 'railroad and other *quasi* public corporations,' and the property of natural persons and of other corporations. Railroad and other *quasi* public corporations are not even put upon the same footing with other corporations, the latter being placed upon an equality with natural persons. A mere change of ownership, under the provision in question, largely affects the amount of taxes paid by the owner upon the same property, without any change in the character, condition, value, use, or circumstances of the property itself. A provision that a black man shall pay double the amount of taxes paid by a white man on the same kind of property similarly situated and used, or upon the identical property, in consequence of a mere change of ownership from a white man to

a black man, might with as good reason be sustained on the principle of classification invoked. The classification in this case is clearly by ownership, and not by condition or use."

(Judge Sawyer, 18 Fed., 432, 433.)

"If this tax can be imposed upon the defendant simply because it is a corporation, when it could not be imposed upon natural persons holding, owning, and using its property under like conditions in all other respects, then it would be difficult to point out what rights are left to corporations, or natural persons in their corporate relations, which the state, under the Fourteenth Amendment, or otherwise, is bound to respect."

(Judge Sawyer, 18 Fed., 440.)

I turn now to some decisions of this court. The leading one in this connection is

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S., 79.

In this case it was held improper to classify, for the purpose of regulating their charges, stock yards doing a large amount of business apart from stock yards with small business. The fundamental point on which the decision rested was, in the language of Judge Brewer:

"Equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head

of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

(183 U. S., 112.)

The quotation from Judge Catron, mentioned by Justice Brewer, is as follows:—

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. *Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.*"

(*Vanzant* v. *Waddell*, 2 Yerger, 260, 270; quoted in 183 U. S., on page 105.)

It was a discrimination against railroads, as against the rest of the world, that was condemned in

Gulf, Colorado & Santa Fe Ry. Co. v. *Ellis*, 165 U. S., 150. (On the question of classification see especially the language of Judge Brewer on page 155; and on pages 165, 166.)

"On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. *Yick Wo* v. *Hopkins, supra,* forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished."

(*A., T. & S. F. Ry. Co.* v. *Matthews,* 174 U. S., 96, 104, 105.)

Blake v. *McClung,* 172 U. S., 239, is an important and significant case. It decides that resident creditors cannot be given by statute a priority over citizens of other states in the distribution of an insolvent company's assets; but that this rule does not extend to corporations of other states, who are creditors "not within the jurisdiction" of the state passing the statute, because (1) they are not citizens of the state where they are incorporated within Art. IV, Sec. 2, of the Federal Constitution (guaranteeing to the *citizens* of each state all the

privileges and immunities of all the citizens in the several states) and because (2) the Fourteenth Amendment assures the equal protection of the laws by a state only to "persons *within its jurisdiction.*" (See pages 260, 261.) So the court felt obliged to rule, solely on account of the limitation of the equal protection of the laws under the Fourteenth Amendment to persons "within the jurisdiction"; "however unjust such a regulation (as this statute established) may be deemed," said Justice Harlan. It is obvious that the court deemed the discrimination between local creditors, though natural persons, and foreign corporations, creditors, as not "equal protection"; and, if so, a discrimination between unincorporated creditors and corporate creditors *within the jurisdiction* (*i. e.*, there incorporated or there resident) would be a violation of the Fourteenth Amendment.

The following decisions are also important:—

> *Strauder* v. *W. Va.*, 100 U. S., 303, 309.
> *Yick Wo* v. *Hopkins*, 118 U. S., 356, 368.
> *Dobbins* v. *Los Angeles*, 25 Sup. Ct. Rep., Part 1, pages 18, 22.

On the general subject, see,

> Judson on Taxation, Sec. 455.
> Guthrie on Fourteenth Amendment, pp. 120-122.

The Court of Appeals of the Seventh Circuit directly decided the point in

> *Northern Pacific Ry. Co.* v. *Walker*, 47 Fed., 681.

Justice Caldwell said for the court:—

"While property may be classified for the purposes of taxation, between the subjects of taxation in the same class there must be equality. Property of the same kind, and in the same condition, and used for the same purposes, cannot be divided into different classes for purpose of taxation, and taxed by a different rule, because it belongs to different owners. But this is precisely what the act under consideration seeks to do. It exempts the lands of the company from taxation simply and solely because they belong to the company, and taxes all other lands by a uniform rule according to their value. It was not competent for the legislature, either under the organic act or the Fourteenth Amendment of the Constitution of the United States, to classify the lands in the territory, for purposes of taxation, into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be taxed. The prohibition in the organic act against making 'any discrimination in taxing different kinds of property' necessarily implies a prohibition against any discrimination in taxing the same kind of property. It establishes the just and reasonable rule, which has become fundamental in our American system of taxation, that the burdens of taxation shall fall equally upon all owners of the same kind of property." (p. 686.)

The cases cited on the subject of classification generally in Point I of this second division of the brief are extremely pertinent here; and I refer to them in this connection.

Finally, let me call the court's attention to the powerful language of Senator Edmunds in his argument of the California Railroad Tax Cases, quoted by Judge Sawyer in 18 Fed., on pages 429, 430. It is too long to quote in this brief; but it is worth any man's reading.

A classification for purposes of taxation which is based merely upon the corporate or unincorporated

character of the property owner is, like that condemned in *Yick Wo* v. *Hopkins*, 118 U. S., 356 (see especially 368), an arbitrary division of the community into those who have and those who have not legislative favor.

3. If discriminatory legislation is allowable *against* corporations, on the ground merely of their corporate character, concerning property of the same kind and in the same use with the property of natural persons not included in the adverse legislation, it will not do to forget that discriminatory legislation will be possible, on the same ground merely of corporate character, *in favor of* the corporations.

4. The possession of "franchises" is not a basis of special treatment of corporations,—at any rate except as to the franchises themselves. It cannot warrant special treatment of their other property for taxation, which is not applied to the same sort of property owned by natural persons and used in the same way.

(a) The franchises of a corporation have been well described as "to be" and "to do." The first is merely its privilege of existence as a corporation; the second consists of its powers. There is a third class of things that have been called "franchises," and perhaps properly enough so-called because granted by the public, viz.: rights to use public property, such as the streets of a city for car tracks, or water pipes, or in similar ways. These last, however, are franchises only in the sense of being granted by the public; they are easements or other property rights, in the same way and with the same character as if they were granted in the same premises by a private owner.

The franchise "to be" a corporation, as it gives it only existence, is no more than the existence of a natural person. And it is not salable or otherwise transferable.

Detroit Citizens Street Ry. v. *Common Council,* 125 Mich., 673, 678, 680.

The franchises "to do," being powers of a corporation, are, as the Michigan Supreme Court said:

"incident to all corporations, and *are manifestly of no more value than the right to exist; for they naturally and impliedly go with it, and are not transferable.* Every corporation has, by implication, authority to acquire and dispose of property, and to carry on business as a private person would do, for the purposes for which the corporation is organized."

(125 Mich., 673, on page 679.)

These franchises "to be" and "to do" have, as the Michigan Supreme Court further and extensively argued, little, if any, direct value, but may react largely on the value of the other property owned by the corporation, through making it usable as a large and profitable aggregate property. (See Detroit Citizens Street Railway Company case, on pp. 679-682.) But it is immaterial for the present discussion whether they are assessed directly or indirectly. Whether they are taken as assessable property themselves, or only as incidentally affecting the value of a company's other property, it is true, as Justice Field said:

"The doctrine of unlimited power of the state over corporations, their franchises and property, simply because they are created by the state, so frequently and positively affirmed by counsel, has no foundation whatever in the law of the country."

(See his discussion of this entire question in 18 Fed.,

on pp. 406-407; and Judge Sawyer's treatment of the same matter in the same case on pages 436-440.)

(b) It is true that franchises, like everything else, may be taxed; and they may be taxed specifically rather than on the *ad valorem* basis, if the legislature sees fit; but the Michigan legislature has not seen fit to impose a specific tax on franchises. It treats them simply as property, and neither applies to them a different method of tax from what is put upon other property of the corporation nor subjects them to a different rate. Their value is included, whether directly or indirectly, in the very assessments underlying the taxes at issue in this litigation.

The statute, Act 173, does not proceed on any idea or declare any policy of treating franchises differently from other property. As Judge Sawyer said: "This is not, and does not purport to be, in any sense a franchise tax." (p. 437.) Indeed, the Michigan constitutional amendment, which authorizes "average-rate" taxation and under which alone Chapter 173 was passed, does not authorize peculiar franchise taxation, but says merely that "the legislature may provide for the *assessment of the property* of corporations *at its true cash value* by a State Board of Assessors, and for the levying and collection of taxes thereon" after the average-rate plan. (Art. XIV, Sec. 10.)

(c) The meat of the matter is, as respects taxation (when an *ad valorem,* and not a specific, tax is imposed upon them), that franchises are simply property, like other property, which enlarge the aggregate assessable property of the corporation, but do not alter the kind of its business or the use to which its property is put.

(d) No two railroads or manufacturing companies or corporations organized for other kinds of business have in their business (though it be the same) exactly the same kind of property in all respects. One railroad has sleeping cars; another has not. One has a Mississippi river or Detroit river bridge; another has not. One has automatic signal plants; another has not. One brewery has special buildings or special machinery of a kind that another brewery does not use. One hotel company has a stone building, another has a wooden one. Differences are multitudinous and surely no such diversities can lead to the conclusion that the two railroads or the two brewereis or the two hotel companies are in a different business, or that their properties can be subjected to different taxation on the theory that they are in a different use.

(e) Other kinds of corporation than those enumerated in Act 173 have franchises, but are not subjected to taxation of the kind established by Act 173. As said by Justice Brewer:—

"If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored."

Gulf, Colorado & Santa Fe Ry. v. *Ellis,* 165 U. S., 150, on page 157.

5. While it is immaterial, the record shows the existence of railroads owned by natural persons in Michigan and of the same kind with railroads owned by complainants.

But even if no such railroads owned by others than corporations were presently in existence in Michigan, they might come into existence any day; and the constitutionality of a statute is to be tested by what is possible under the law, not by the mere transient and accidental situation at a given moment.

Stuart v. *Palmer*, 74 N. Y., 183, 188.

State v. *Canada Cattle Car Co.*, 89 N. W. Rep., 66 (Minn.).

Minneapolis Brewing Co. v. *MacGillivray*, 104 Fed., 258, 269.

Tenement House Dept. v. *Moerchen*, 89 App. Div., 526, 531, 538.

The privilege of owning and operating railroads as public carriers belongs to natural persons at common law.

1 Rorer on Railroads, Sec. 2, p. 8.

1 Elliott on Railroads, Sec. 1, p. 1.

McKee v. *G. R. Street R. Co.*, 41 Mich., 274, 279.

Moran v. *Ross*, 79 Cal., 159 (21 Pac. Rep., 547).

County of Santa Clara v. *Southern Pacific Ry. Co.*, 18 Fed., 385, on page 433.

Henderson v. *Ogden City Ry. Co.*, 7 Utah, 199 (26 Pac. Rep., 286).

Bank of Middlebury v. *Edgerton*, 30 Vt., 182.

Lawrence v. *R. R. Co.*, 39 La. An., 427.

In the Matter of Kerr, 42 Barb., 119.

Judge Sawyer said:

"That natural persons may own and operate a railroad in this state, as well as corporations, is manifest

from the fact that this road is mortgaged under the authority of the laws of the state, and this of itself necessarily involves the power to sell and convey, in case the occasion arises, under a decree of foreclosure, to any party who is willing to pay the highest price for the road. It also appears, as a fact in this case, that a natural person purchased a railroad operated in more than one county, extending from Marysville, in the County of Yuba, to Oroville, in the County of Butte, under a decree foreclosing a mortgage, received his conveyance therefor, and that he has been operating it and been assessed and has paid taxes upon it for more than two years past. So, also, numerous statutes of the state were introduced in evidence, granting the right to natural persons, not incorporated, to build and operate railroads. * * * Thus private parties owning and operating railroads covered by mortgages, and situated in all respects precisely as railroad corporations are situated with respect to the same *kind of property*, would only be required to pay taxes upon the excess of the value of the road or other property over the value of the security; while the holder of the security would be assessed for and pay the taxes on the value of the security."

(18 Fed., 385, on page 433.)

The Supreme Court of Michigan said:

"There is no more difficulty in allowing individuals to exercise these powers than corporations, and the use of them for a brief period in no way interferes with the protection of the franchise in perpetuity. There might be difficulties in managing larger enterprises, and different rules have been applied to them. But there are no difficulties in the way of private management of a street railway, and there is no reason why the statute which by its language includes them should be made to exclude them."

(41 Mich., 274, on page 279.)

The decision in this case related as much to ferries, turnpikes, and bridges, as to street railways.

The Vermont court said:

"It is not necessary in this case that we should hold that the franchise to this company to be a corporation is a subject of sale or transfer. The right to build, own, manage and run a railroad and take the tolls thereon is not of necessity of a corporate character or dependent upon corporate rights. It may apply to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable."

(30 Vt., 182, on page 190.)

The Utah court said:

"In the nature of things, is there any sufficient reason why individuals, as such, should not be permitted to construct and operate railroads as well as natural persons through the instrumentality of corporations? A private corporation is a legal person, with power to act as a natural one to the extent that its charter authorizes it to. When the road is owned and operated by a corporation the stockholders own the road through the agency of the corporation, but the use is in the public. When individuals, as such, own and operate it, the property is in them, and the use is then in the public. In the first case, the proceeds of the business, after deducting expenses, is paid to the stockholders as dividends. In the latter, the individuals retain such earnings as are not consumed by expenses. Either can acquire the right of way by contract or in the exercise of the right of eminent domain when the law authorizes it; and neither can acquire it in the latter way without such a statute. The right of natural persons through the instrumentality of corporations are usually limited to one department or class of business; but without such instrumentality their rights extend to every field which their enterprise, their skill, or business capacity and inclinations may enable and cause them to enter. We do not find anything in business methods or in the fitness of things to prevent natural persons from constructing and operating railroads when they have the inclination, and can command the pecuniary

means to do so; nor do we know of any statute in force in Utah, or any rule of law or adjudged case, against it."

(7 Utah, 199.)

Beside the common law right of natural persons to own and operate a railroad, *the statutes of Michigan recognize such right.* More commonly, of course, the statutes contemplate corporate ownership, because that is the more common fact; but, instead of forbidding natural ownership, they refer to it here and there in terms. See Sections 6271, 6280, 6281, 6282, 6313, 5256, 5257, 5458, 5461 of the Compiled Laws of 1897. Sections 5256 and 5257 are from Act 142 of 1895, and Sections 5458 and 5461 from an act of 1893.

It will be noticed, too, that Sections 6271 and 6313 indicate that the word "company" in the statutes often means any aggregation of persons owning a railroad, whether or not incorporated; further, Sections 6224, 6262, 6331, 6341 and 6370 relating to foreclosure of railroad mortgages, all contemplate the purchase of the railroad at foreclosure sale by natural persons, and their possession and enjoyment of the railroad thereafter. Indeed, the Michigan Supreme Court has said of these statutes:

"May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, *independent of any express statutory authority to operate,* the purchaser was authorized to maintain his property rights and to operate this railroad in accordance with the franchise of the original company and under precisely the same conditions? If this be so, the authority to incorporate was not essentially a part of the property right,

but was a privilege granted by the state which might be withdrawn."

Commissioner of Railroads v. *G. R. & I. Ry. Co.*, 130 Mich., 248, on page 253.

We thus see that the common law permits natural, as distinguished from artificial, ownership of railroads; that the statutes of Michigan do not forbid it; that many Michigan statutes must be taken as applicable to such a case; and that the Michigan statutes affirmatively contemplate the occurrance of natural ownership of a railroad, through foreclosure sale if in no other way. At least one or two naturally-owned railroads already exist in Michigan; but any day more may come into existence. As the law allows it, the law must be taken to expect it. Indeed, if the constitutionality of Act 173 were held to depend upon the actual existence of a railroad owned by natural persons, it would be within the power of, and easy for, stockholders or officers of any of complainant companies to organize a railroad any day and own it themselves without incorporation. Is the constitutionality of this statute to be regarded as lying within voluntary action of a few individuals? Is the statute to be considered as constitutional at this moment, though it may not be to-morrow?

6. Act 173 applies to express companies; and it is well known, besides being proved in the record, that natural persons, as well as corporations, are doing express business in Michigan. If, then, the argument contained in this Point VIII is sound, the statute is palpably invalid as to express companies. It is equally invalid as to any of the other kinds of companies

enumerated in it, if natural persons are engaged in Michigan in like kind of business. Will the court suppose that the legislature would have applied the system of taxation contained in Act 173 to a part of the companies enumerated in that act, if it had been informed, by a decision of this court, that it could not apply it to all those companies? It is not readily to be believed that the legislature would have singled out railroads only, or a few of the different kinds of companies, for special treatment in a group even narrower than the legislature created.

7. The constitutional amendment says that the legislature may tax in the special way contemplated by it "the property of corporations." (Art. XIV, Sec. 10.) That includes manufacturing corporations; commercial corporations; and all other kinds of corporations. If the legislature can under this constitutional provision tax corporations of any kind after average-rate plan and exclude natural persons in the same business from the operation of that plan, it can extend the average-rate system of taxation to manufacturing companies or commercial companies any day, and still leave natural persons engaged in like manufacture or commerce out of the law. This illustrates the perils that lie in the idea that a corporation may be taxed differently from other persons with the same kind of property, used in the same kind of business.

IX.

Art. XIV, Section 14, *of the Michigan Constitution requires (and, before the constitutional amendments of* 1900 *were adopted, it was for the benefit of all persons and property in Michigan) that "every law which imposes, continues or revives a tax shall distinctly state the tax and the objects to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object"; but the amendments of* 1900—*Art. XIV, Sections* 10-13—*permit corporations to be deprived of that protection, and appellants have been deprived of it by Act* 173.

1. The quoted constitutional provision was taken by Michigan from New York, where it was Art. VII, Section 13, of the N. Y. Constitution of 1846.

1 N. Y. Rev. Stats., page 68 (5th ed.).

The meaning and purpose of the provision were thus set forth by the New York Court of Appeals:

"The Constitution, prescribing the requisites of a law imposing a tax, is in harmony with the other provisions designed for the protection of the taxpayer. Its terms are precise and unambiguous, leaving no way of escape from a literal compliance with them, and no room for evasion by any lax interpretation. They are so plain they need no interpretation. It declares that 'every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.' The tax would have been well specified in amount but for a clause, found for the first time in a tax law. A tax of three and one-half mills upon the dollar of the assessed value of the real and personal property in the state is definite and certain. But the legislature have

qualified the same and authorized the tax to be reduced if it should be found, upon a corrected estimate, that a lesser tax would give the necessary means. The law imposes a tax of three and a half mills per dollar, or so much thereof as may be necessary to provide for the payment, etc. *This is not a specific and distinct statement of the tax to be levied.* It is simply a statement of the maximum tax to be levied, leaving it to the discretion of the adminstrative officers of the state to levy such tax as they shall find necessary up to the limit named. The legislature cannot, under the constitution, thus delegate the power of taxation. They must determine the amount necessary and adequate, and declare the amount to be levied absolutely. If this form of enactment is allowable, a law authorizing a tax of fifty per cent. of the assessed value of the taxable property of the state, or so much thereof as might be necessary, would be valid, and the whole legislative taxing power delegated to the other departments of the state government. *The law is invalid as not stating the tax imposed.*"

> *People* v. *Board of Supervisors of Kings County,* 52 N. Y., 556, on pages 566 and 567.

This shows, as the constitution's own language makes perfectly clear, that as to all but corporations in Michigan there is a direct constitutional requirement (a) that the amount of any tax be fixed by the legislature and that such duty be not delegated to others, and (b) that the amount of the tax be "*distinctly stated*" by the legislature that fixes the tax.

(a) The first requirement adds nothing to what we have already seen that the fundamental principles of republican government demand; and I have already argued (Point V) that the grant of this protection to some and its denial to others is contrary to the four-

teenth amendment of the federal constitution. The special value of the Michigan constitution's provision in this respect lies in the fact that it furnishes an explicit declaration by the people of Michigan concerning the importance attached, in the Michigan system of laws, to a feature which heretofore I have contended is fundamental in the whole American system.

(b) The constitutional provision, however, does more than require the legislature itself to fix the amount of tax. Beyond that, it requires the legislature *itself* to "*distinctly state* the tax." Here we get a feature in which Act 173 denies to appellants such fundamental protection as is given to all others in Michigan by virtue of the quoted constitutional provision, even though for the purposes of the present point it be admitted that the amount of tax levied under Act 173 is fixed by the Michigan legislature and the power to fix that amount has not been delegated. *Even if Act* 173 *is to be considered as fixing the amount of tax to be raised under it, it does not distinctly state that amount.* "Distinct statement" must mean that the amount of tax can be found in the law itself, either through statement of the gross sum that the state decides to raise or through statement of the definite rate which the state decides upon. Neither of these things is in Act 173. Nobody can find out the amount of tax to be raised for the state under Act 173 by reading the whole of that statute. *On the contrary, reference has to be made to multitudinous enactments of the local legislatures of the state before anybody can ascertain the amount of tax.* And not only so, but reference must be made to all the assessments

throughout the state before the amount of tax under Act 173 can be known; for those assessments operate, *not merely to apportion the tax*, but to determine its very amount. Now, look at the further language of the Michigan constitution, as it operates for the protection of others than appellants, viz. "*and it shall not be sufficient to refer to any other law to fix such tax.*" This is an express and emphatic prohibition against making the amount of tax to be collected under any statute ascertainable only upon reference to other legislative acts. It requires each statute that the legislature passes for collection of a tax to state the amount of that tax *directly, and not indirectly.* Act 173 (even if, as I have said, it be assumed that it fixes the amount of tax at all) fixes it only indirectly, by reference (1) to the other enactment of the state legislature which fixes the state tax for other people (and which affects, therefore, the average-rate); (2) to the enactments of the local legislatures throughout the state which fix the amount of local taxes that enter into the average-rate; and (3) to the assessments throughout the state, which under Act 173 determine, not the apportionment of the tax laid under that act, but the amount of that tax.

Appellants, therefore, are denied by the fourteenth amendment to the state constitution and Act 173 a protection, in the way of *distinct* and *direct* statement by the legislature itself of the tax it requires, which so radical a part of the Michigan laws as the state's constitution guarantees to all others. Is this the equal protection of the laws? Can it be said that what the people of Michigan think of importance enough to put

into their organic act of government and what, therefore, the Michigan laws themselves confess to be of fundamental value, is of so little moment that it may be continued for the benefit of some and taken away from others without working an inequality in the protection of those very Michigan laws? The legal system of Michigan, and the people that made it, have themselves set a value upon the protection now denied appellants. (See at length on this point pages 567-570 of the opinion in 52 N. Y., 556.)

2. The provision of Art. XIV, Sec. 14, of the Michigan constitution is important in still another way. It was part of the purpose of that provision, undoubtedly, to give the public notice, through the distinct and direct statement in each statute of the amount of tax proposed to be raised by that statute, of the pending tax proposition in simple and definite form, in order that the people might go to the legislature, either in person or by the method of petition guaranteed to them, as we have seen, by other provisions of the same constitution, and argue against any taxation whose amount might seem oppressive or whose object might seem objectionable. In other words, it was part of the purpose of this constitutional provision to afford *a real and reliable opportunity* for hearing by the legislature; not only through giving notice that some tax was proposed, but equally through giving notice just how large a tax was proposed. The people of Michigan, all of them except appellants, retain the protection of the constitution in that respect. Appellants had it until lately; but now are refused it. How could they go before the legislature, either when Act 173 was

pending for enactment or since its enactment, and argue that it would raise for the state more money than the state would need? Neither appellants nor anybody else could tell how much it would raise, and, therefore, they could not intelligently discuss the first essential for a comparison of the tax with the state's needs. In order to forecast the operation of the law, in raising revenue for the state, anybody would have to forecast the independent action of all the local legislatures of the state, in their own enactment of taxes.

This furnishes another proof of the large importance to taxpayers of the constitutional provision under discussion. Its immediate bearing is that, though we again suppose for the purpose of argument that Act 173 is not a delegation to the local legislatures through the state of the power to tax for state purposes, still through the state's failure itself to declare the amount of tax, proposed to be collected from the state's subjects, the people who would be called upon to pay the tax could have no idea of its amount, and, therefore, could have no real opportunity for hearing by the legislature on the subject of the tax and for discussion of its propriety.

Third. Act 173 violates the Constitution of Michigan, which, notwithstanding the amendments of 1900 (adopted to legitimate the "average-rate"), still requires that all assessments be at the "cash value" of the assessed property, and still requires that all taxation be uniform (except, of course, as to "specific" taxes) in respect of assessment.

1. The credits of all persons in Michigan, except those taxed under Act 173, are assessed at their *net* value, after deduction of the debts of the taxpayer. This is expressly provided in the statutes. Section 3831 of the Michigan Compiled Laws of 1897, which restates Section 8 of the "Act to provide for the assessment of property and the levy and collection of taxes thereon," etc., requires taxation of "all credits of every kind belonging to inhabitants of this state over and above the amounts respectively owed by them, whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without the state."

The form of return made by taxpayers at large calls for a return by them of:

"2. All credits of every kind owing to such person, whether such indebtedness is due from individuals or from corporations, public or private, or whether debtors reside within or without this state, including all deposits in banks or with other corporations, or individuals, together with a statement of any part thereof that is secured by real estate mortgage on lands situated in some other state;

"3. All *bona fide* indebtedness owing by such person, giving an itemized statement in detail, how secured, and to whom owing and the residence of such

creditors and the amount due each, *provided he desires to have the same deducted from his credits.*" (Section 3842.)

It is clear, therefore, that the value of the credits of persons generally for taxation is their excess above debts. On the other hand, under Act 173, all the credits of corporations are required to be assessed at their *gross* value, without any deduction of debts.

Thus, Section 5 of the act declares:

"The term property as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, road bed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switch boards, and all other property used in carrying on the business of said corporations or owned by them respectively, and all other real and personal property."

Section 6 requires the corporation to report for taxation upon a prescribed blank, which calls, among other things, for:

"*Ninth.* A detailed statement of the personal property, *including* moneys and *credits* owned by the company in Michigan, on the second Monday in April in the year in which the report is made, where situate, and the value thereof."

No provision is made that the debts of the company be reported; and no provision is made anywhere in the act for deduction of debts from credits, or for any consideration of that question by the State Board of Assessment. And the Board's powers are measured by Act 173. Indeed, it is admitted, without the slightest pretense to the contrary, that the Board *in fact* did

not make or attempt any deduction of a railroad's debts from its credits.

The difference of statutory rule and the actually different treatment of appellants and of taxpayers generally in respect of credits are, therefore, unmistakable.

2. The constitutional rule that the assessment of property, when it is taxed *ad valorem*, be at its cash value, in the case of *all* taxpayers, is equally plain. These provisions are printed in Appendix B.

Article XIV, Section 12, was not amended in 1900, and it reads now, as ever since its adoption in 1850, thus:

"All assessments hereafter authorized shall be on property at its cash value."

This section obviously covers assessments by the State Board, as well as any other assessments. But, the specific provisions of the constitution, concerning what the legislature may authorize the State Board to do, are no less direct in regard to assessment at cash value.

Article XIV, Sections 10 and 11, as amended in 1900, are as follows:

"Sec. 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide *for the assessment of the property of corporations, at its true cash value,* by a State Board of Assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November 6th, A. D. 1900,

shall be applied as provided for specific state taxes in section one of this article.

"Sec. 11. The legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: *Provided*, That the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the *rate* of taxation of such property shall be at the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which *ad valorem* taxes are assessed for state, county, township, school and municipal purposes."

The form of these sections, before their amendment in 1900, was as follows:

"Sec. 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank road and other corporations hereafter created.

"Sec. 11. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

It thus appears that the constitution formerly made only one declaration about assessments, viz., that of Section 12, which remains unaltered; and, in changing Sections 10 and 11, the purpose was only to permit an "average-rate" (which, it will be remembered, the Supreme Court of Michigan had declared invalid in 1899; *Pingree* v. *Auditor General*, 120 Mich., 95). But, the constitutional amendment adds to the unqualified rule of Section 12, about assessments, a particular and direct statement that "the legislature may provide for the assessment of the property of corporations, *at its true cash value*," by a State Board of Assessors. (Sec.

10.) The complete uniformity of all assessments, whether under the general tax laws or under the average-rate plan, was, therefore, sedulously required.

Still further,—*the uniform rule of taxation, except on property paying specific taxes*, established by the old Section 11, is preserved with the single exception of the "average-rate." Section 11 remains unaltered, save by the addition of the proviso, making the average-rate possible. The requirement, in the proviso, of "an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors" for average-rate taxation simply calls for uniform application even of the average-rate. That is, while corporations now may be taxed at one rate, though persons generally are taxed at another, even the different corporate rate must be uniformly imposed, and not arbitrarily, among corporations. This requirement of uniform taxation of corporations, in the proviso, is not inconsistent with the general requirement of a uniform rule of taxation made by the old Section 11, continued unaltered as the first sentence of the new Section 11. If there could be doubt otherwise on that point, as respects assessments, it is impossible in view of the explicit declaration of Section 10, as amended, that the assessments by the State Board, like all assessments under Section 12, must be at "cash value."

Indeed, the Michigan Supreme Court has already said that the amendments of the State Constitution in 1900 do not alter the rule that assessments of *all* property must be alike, at cash value; for, in the mandamus proceeding brought by the Board of Educa-

tion of Detroit to settle the construction of Act 173, as respects computation of the average-rate, it said:

"This constitutional provision (*i. e.*, for corporate taxation at an average-rate) cannot be segregated from other provisions relating to the subject of taxation. Construed in the manner above indicated, it is in entire accord with our whole system of taxation *which is not only that railroad property, but that all other property, shall be assessed at its cash value, and that all classes of property shall bear the burden of taxation equally.*"

Board of Education v. *State Assessors*, 133 Mich., 116; 120.

3. The decision by the State Court in *Pingree* v. *Auditor General*, 120 Mich., 95, settles two things of immediate importance:

(1) The tax under Act 173 is not a "specific" tax, but a property tax. That was directly decided. (pp. 96-102.)

(2) Before the amendments of the constitution in 1900, the "uniform rule of taxation except on property paying specific taxes," required by Section 11, forbade difference of rate on different kinds of property. (p. 102, *et seq.*) *A fortiori*, the requirements *still* by Section 12 that *all* assessments be at cash value, and by Section 11 that assessments by the State Board be at cash value, forbid assessment of credits, when owned by corporations, at their gross amount, without any allowance for debts, while all other persons' credits are assessed at their net value, above debts. Identity of rate even being essential to "uniformity" under the Michigan Constitution before the amendments of 1900, and being still essential with the express exception of an "average-rate" upon corporations, identity of sub-

stantial method in valuing the credits of all persons, natural or corporate, is essential under the identical rules, still found in the constitution, for assessment of all property, whether owned by natural persons or by corporations, at "cash value."

Indeed, this very question is settled, not only by *Pingree* v. *Auditor General*, but also by

> *Detroit Citizens Street Railway Co.* v. *Detroit*, 125 Mich., 673.

This decision was on the exact point of what "uniformity" requires in the way of deducting debts from credits. The statute, declared unconstitutional, allowed to street railways deduction of debts from the value of *any* personal property, though the general rule for assessing others was to deduct debts only from credits; and that difference was held improper, because not compatible with uniformity. The court said:

"Again, the provision for deducting debts from personal property would be invalid, because not uniform with the usual method of deducting debts, viz., from credits only." (p. 694.)

And, attention is once more asked to the plain statement that all property is to be assessed at its cash value, on page 120 in

> *Board of Education* v. *State Assessors*, 133 Mich., 116, quoted above.

The point that Michigan's "uniform rule of taxation" requires identical taxation of all kinds of property (except as now an average-rate is expressly permitted) is further enforced by the decision that an inheritance tax, if imposed upon property instead of being a "specific" tax, is invalid for difference of rate.

(*Chambe* v. *Wayne Probate Judge*, 100 Mich., 112.) This position has been reiterated:

> *Union Trust Co.* v. *Probate Judge*, 125 Mich., 487.
>
> *Steilwagen* v. *Wayne Probate Judge*, 130 Mich., 166, 167.

In the former of these cases, also, the court declared flatly that *Pingree* v. *Auditor General*, 120 Mich., 95, required identical rates on different properties; saying,--

"As before, the attorney general seems to concede that, if this is a tax upon property, it is in violation of section 11 of article 14, unless it can be called a specific tax upon property, and therefore within its exception; a concession (if we are right in understanding it to be made) which is, in our opinion, justified by the case of *Chambe* and the later case of *Pingree* v. *Auditor General*, 120 Mich., 95. *The latter case has settled the rule that an ad valorem tax upon property must conform to the uniform rule for the general taxation of property, and that such is not a specific tax,* which will be found unequivocally stated in each of the opinions filed in that case." (p. 490.)

Denial to banks and insurance companies of the privilege of having deducted from the amount of their assets the amount of real estate mortgages upon which they pay taxes directly is not uniform taxation in Michigan.

> *Standard Life & Accident Ins. Co.* v. *Assessors of Detroit*, 95 Mich., 466.

Further; it was held in *Saltonstall* v. *Board of Review of City of Sheboygan*, 132 Mich., 196, that it was unconstitutional to provide that farming lands and wild and unimproved lands within a city shall be as-

sessed "at their true cash value considering the location of the same, and not according to any prospective or supposed value of such lands as city property."

The court said:

"Const. Art. 14, Sec. 12, provides that all assessments hereafter authorized shall be on property at its cash value. We are all agreed that this constitutional provision does not leave room for a different basis of valuation of real property as vacant or occupied. Nor can it be evaded by authorizing a valuation of one class of property based upon its value for a particular use only. To use an extreme illustration, a valuable painting might be framed so as to be available for use as a fire screen. Yet it would not do to say that this constitutional requirement was met by authorizing the assessment of such a piece of property at its cash value as a fire screen. The only safety is in refusing to fritter away this valuable protection to the taxpayer by any refined construction. The intent of the framers of this provision is perfectly clear, and we hold that the actual value of the land must be the basis for assessment. See cases cited in note to section 3847, 1 Comp. Laws. Cases cited from other jurisdictions, construing constitutional provisions essentially different from ours are of little aid, and certainly cannot be given the force of authority justifying a distortion of plain English." (p. 197.)

This court's own decisions concerning taxation of national bank shares are very pertinent, holding that under the Act of Congress which permits their taxation by the state at a rate not higher "than is assessed upon other moneyed capital," it is improper to assess them without deduction for the taxpayer's debt, when such deduction is allowed by the state laws from assessments of other property.

People v. *Weaver*, 100 U. S., 539.

Supervisors v. *Stanley*, 105 U. S., 305.

And, generally, assessment of bank shares upon a plan more burdensome than is used in assessing other moneyed capital is illegal.

Pelton v. *Nat. Bank*, 101 U. S., 143.

San Francisco Nat. Bank v. *Dodge*, 197 U. S., 70.

4. The dilemma under the State Constitution, as directly and repeatedly interpreted by the highest court of that state, is plain. The decisions come to this: What "cash value" means, under Article XIV, Section 12 of the Constitution, as to other property, it means under the same section and under Article XIV, Section 10, as to corporate property. There is no possible escape from this simple proposition. If, then, cash value means, as to credits of all persons but corporations, their net value above debts, it cannot mean more as to the credits of corporations. And so, Act 173 violates the State Constitution in taxing appellants on the gross amount of their credits, while all others in Michigan are taxed only on the net value of their credits.

5. It was suggested for the defendant in the Circuit Court that the general provision for deduction of debts from credits, in favor of people not taxed under Act 173, is itself unconstitutional, because "cash value" in the constitution must mean gross value. In other words, the claim was that Act 173 is all right, and the general statutes are all wrong, on this subject of credits. The resort to such a contention demands little attention, and illustrates the desperate character of the case, as to credits, under the state constitution and the state court's decisions.

The claim has three answers:

(1) It neglects the legislative history of Michigan. The tax laws of that state have allowed deduction of debts from credits since 1838; nearly seventy years.

See:

> *Rev. Stat.* 1838, p. 76; Title V, Ch. 1, Sec. 3.
>
> *Rev. Stat.* 1857, Title VIII, Ch. 17, Sec. 3; being part of "An Act to provide for Assessing property at its true value, and for levying and collecting taxes thereon," approved Feb. 14, 1853.
>
> *Comp. Laws* 1871, Title VII, Ch. 21, Sec. 3.
>
> *Howell's Statutes* (1882), Vol. 1, p. 1265; being Sec. 2 of "An Act to provide for the Assessment of Property," approved March 14, 1882.
>
> *Howell's Statutes* (1883-1890), Vol. 3, Sec. 1170 a-1; being Act 195 of Public Acts of 1889 (p. 230).
>
> *Act* 200 *of Public Acts of* 1891, Sec. 2 (p. 280).
>
> *Act* 206 *of Public Acts of* 1893, Sec. 8; being the first enactment of what is now Sec. 3831, Subd. 6, of the Comp. Laws of 1897.

The Michigan Constitution has required assessment of property at "cash value" since 1850, when the present constitution was adopted. (Page 134, Mich. Comp. Laws of 1897, Vol. 1; and Sec. 12 of Art. XIV, on p. 116.)

We thus have a legislative interpretation of the constitution for fifty-five years. The people themselves have never moved for a change either of the

statutes or of the constitution. On the contrary, as already stated, when in 1900 the taxing sections of the constitution were amended, to the extent of permitting an average-rate on corporate property, the rule for assessment at "cash value" was continued for universal application. The executive department of Michigan, too, has steadily acted on, and enforced, the rule for deducting debts from credits. And, finally, the judiciary of the state has recognized that rule repeatedly, and never questioned its validity. See the following cases:

First Nat. Bank v. *Township of St. Joseph*, 46 Mich., 526, 530.

Beecher v. *Common Council of Detroit*, 110 Mich., 456.

Detroit F. & M. I. Co. v. *Hartz*, 132 Mich., 518, 520.

Sears v. *Cottrell*, 5 Mich., 251, 262.

City of Marquette v. *M. I. & L. Co.*, 132 Mich., 130.

Village of Howell v. *Gordon*, 127 Mich., 517, 519.

Bears v. *Grand Rapids*, 129 Mich., 572, 575.

City of Detroit v. *Lewis*, 109 Mich., 155, 159.

Latham v. *Board of Assessors*, 91 Mich., 509, 512.

Davenport v. *Auditor General*, 70 Mich., 192, 193.

Humphrey v. *Auditor General*, 70 Mich., 295.

Attorney General v. *Supervisors*, 71 Mich., 16, 22, 26.

Of the force of such considerations, on the very question in hand, the Minnesota Supreme Court says:

"The executive department of the state has always recognized the validity of the law, and the right to make deductions has never been questioned until the present time by any of the officers to whom has been committed the duty of making assessments and collecting taxes. Again, the validity of this statutory provision has always been taken for granted in the judicial department of the state government. It has always been assumed that the practical construction placed upon the constitutional provisions by the legislative and the executive branches was correct; and upon this assumption the courts have acted hundreds of times, in all probability; and in this construction the people of the entire state have acquiesced for nearly two score years. These facts indicate, clearly, in what sense the constitutional provisions relied on by counsel for appellant were understood by all, and what it was supposed they meant. This practical construction cannot be disregarded, but must be allowed to control the interpretation to be placed upon the language by this court."

State v. *Moffett,* 64 Minn., 292, on p. 294.
Treasurer of Fayette County v. *P. & D. Bank,* 47 O. St., 503.

(2) Such a rule for deducting debts from credits exists very commonly in the United States; and is deemed important to fair taxation. Abundant authority, from many sources, supports it.

Florer v. *Sheridan,* 137 Ind., 28.
State v. *Smith,* 158 Ind., 543.
Treasurer of Fayette Co. v. *P. & D. Bank,* 47 O. St., 503, 521.
State v. *Moffett,* 64 Minn., 292.

Arosin v. *L. & N. W. Am. M. Co.,* 83 N. W. Rep., 339.

Pullman State Bank v. *Mauring,* 51 Pac. Rep., 464.

National Bank of Wellington v. *Chapman,* 173 U. S., 215.

Statutes providing for deduction of debts from credits, or from moneys and credits, have been construed without question as to their constitutionality in the following cases:

Morris v. *Jones,* 150 Ill., 542.

Sigfried v. *Raymond,* 190 Ill., 424.

Gray v. *Street Commissioners,* 138 Mass., 414.

Deane v. *Hathaway,* 136 Mass., 129.

Seward Co. v. *Cattle,* 14 Neb., 144.

Jones v. *Seward Co.,* 5 Neb., 561.

Equitable Life Ins. Co. v. *Board of Equalization,* 74 Iowa, 178.

H. I. Co. v. *Same,* 75 Iowa, 770.

Hutchinson v. *Board of Equalization,* 67 Iowa, 182.

(3) Even if this court should hold void under the Michigan Constitution the Michigan statutes for deduction of debts from credits, in favor of all but the corporations taxed under Act 173, notwithstanding the existence of such statutes since 1838 and the legislative interpretation of the constitution for fifty-five years as allowing such deduction, and notwithstanding the continuous popular acquiescence in that practical interpretation of the constitution, and notwithstanding the several recognitions of the validity of those stat-

utes by the Michigan Supreme Court, still the railroad taxes for 1902, involved in these suits, would not be helped, because *all taxpayers of Michigan, but those taxed under Act 173, were actually given by the local assessors through the state in 1902 the benefit of deducting their debts from their credits.* The discrimination was actually allowed in the taxation for 1902 between appellants and the other taxpayers of the state. Even if the general rule of deducting debts was unconstitutional, the general assessors did not know it,—indeed, had reason in the legislative, executive and judicial action of the state for years to believe that their duty required the deductions—and so, in assessing property generally, they made the deductions. That action was *general and intentional;* being the result of a supposed legal requirement. Appellants, therefore, were discriminated against in the taxes of 1902, in the matter of assessment of credits,—whether the local assessors acted rightly or wrongly. Appellants' credits, in the supposed view, were assessed at full "cash value," while the credits of all others were assessed, by a conscious, general and intentional practice, at as much less than their "cash value" as debts were deducted from credits. The constitutional rule of Michigan that assessments be uniform was violated just the same, whether the statute for deduction of debts from credits was wrong or merely the action of the local assessors under it was wrong.

And, indeed, if general assessments were made too low, through unauthorized deduction of debts from credits, the result inevitably was to make the "average-rate," applied to appellants' property, too high,—

through wrongful reduction of the aggregate assessments used in computing the average-rate. So that appellants not merely were denied the benefit of the state constitutional provisions for uniform assessment of all property at cash value, but were subjected to an average-rate higher than was lawful.

6. The State Board, in making the assessments on which were based the taxes involved in this litigation, had before them the statements of the railroads giving the amount of their credits, as required by Act of 173, Section 6, Subdivision Ninth; and those statements, of course, were used by the board in making, and were doubtless the chief foundation for, the assessment. It is not to be supposed that the board gave no heed to credits. *They were bound to under the law*, as shown by the explicit provisions to which reference has been made; and the idea cannot be entertained that the board discarded from its consideration elements that the statute called upon them to include. Further than that, it stands out in all parts of the record that, beside direct consideration of the value of the different items of property owned by the railroads assessed, the board pursued *three general methods;* one of them based upon the market prices of the stocks and bonds of the railroad company, another of them based upon gross earnings, and the third based upon net earnings of the company. It is unimportant here in what special way or under what rule of calculation (whether Professor Adams's or Professor Johnson's or somebody's else) the board utilized these data. It is enough to show that *each railroad company's credits influenced the assessment against it under any one of these gen-*

eral methods; for the credits, just as much as any other property belonging to a company, must be deemed to have affected the market price of its stocks and bonds; and the credits belonging to any company entered just as much as any other property into the aggregate of its gross earnings or nét earnings. The only thing that depends upon the particular method or methods that the board used in making the assessment, and upon the weight attached by the board to the different methods it employed, is the *definite amount* by which any company's credits enlarged its assessment. It is enough for present purposes that those credits enlarged the assessment certainly *in some amount.*

Debts, also, were shown in the returns of the several appellants; and in large amounts. (For illustration, as to both credits and debts, see Michigan Central Record, pp. 266-278.) The bond issues of appellants, shown in their respective returns, were also debts. Appellants in all the cases before the court had, like all railroad companies, of necessity large credits, and also large debts, both funded and current.

There was, therefore, an actual situation before the State Board in which credits had to be, and were, considered and included in the assessment, though how much they raised the assessment it is not possible to say; and in which debts were before the board, but under the law had to be, and were, disregarded. Injustice, therefore, was actually wrought in the assessment, if the statutory discrimination as respects deduction of debts from credits between appellants and other persons in Michigan is unconstitutional; and that injustice has no less been done though the amount of it is not ascertainable.

7. Does the whole statute, Chapter 173, fall because its provision for assessment of credits in full is unconstitutional, or are only the assessments and consequent taxes for 1902 invalid? The entire statute is void; because,

(a) The statute could only be sustained in its other parts in case the State Board were authorized to make the deduction of debts from credits, as other assessors in the state do for other people. In order, therefore, to save the statute, *it is necessary for the court to put into it a new, affirmative, provision* empowering the State Board to deduct debts. That the court cannot do. Such an authority is not in the statute, and the court cannot add it to the statute. This is not a case of merely dropping an unconstitutional part out of a statute; and leaving the remnant in existence. That remnant of Act 173 will not entitle the State Board to do the very thing that is necessary to preserve the statute, viz. deduct debts from credits.

(b) Nor can the statute be saved by dropping out credits entirely from the assessment. That would go beyond the discrimination that exists (which consists only in not allowing debts as an offset to credits to the extent that debts may exist—not in failing to disregard credits altogether, whether debts exist or not); *and would make another discrimination in favor of corporations and against other persons.* Nor is it to be supposed that the legislature would have passed the law at all, with the total omission of credits from taxation.

This question of deducting debts from credits, or of eliminating credits entirely without reference to

debts, is not a small one in the case of railroads and of such other corporations as are taxed in Act 173. Railroad mortgages are debts, and the credits of railroads (through inter-road relations and the great volume of their business) are always very large.

(c) If the statute were to be saved, by the court's making a requirement (which does not exist in the statute itself) for the deduction of debts from credits, the Board of Assessment would have to make such deduction, inasmuch as it would remain the assessor under Act 173; *but the board would have no power to make such deductions.* The board is a creature of this very statute, and its authority therefore must be measured by the statute. The court cannot vest it with new powers.

Before Act 173, railroads were taxed specificially on their gross earnings, and not *ad valorem.* The railroad credits (so far as they were earned through railroad service) were included in gross earnings; and nobody then had any occasion to deduct debts from them. The clauses of the general assessment law of Michigan, providing for the deduction of debts from credits, were inapplicable to railroads and applied only to others taxed after the *ad valorem* plan under the statute containing the provision about debts and credits. Those clauses cannot be extended to railroads until railroads are assessed under the same law as other people, by the local assessors. *It is the local assessors only who are empowered by the Compiled Statutes to deduct debts from credits.* Those statutes do not relate at all to the powers of the Board of Assessment, in doing their work under Act 173.

Nor is the consideration of debts for the purpose of making a proper deduction on their account from credits a merely formal or ministerial act. On the contrary, it involves an important and semi-judicial discretion; like the other work of assessment. Even if the deduction of debts by the board were a ministerial act, the State Board of Assessment would have to be authorized by statute to perform such act; for particular officials cannot do any act which the statutes do not empower those very officials to do. But *the deduction of debts from credits involves much discretion.* In making such deduction, the State Board would have to decide upon (1) the actual existence of the debts and (2) their true amount. Both these questions would very frequently involve such important matters as the honesty or dishonesty of the returns made to the board, or of the witnesses before them; the true interpretation of complicated contracts; and the correct statement of intricate accounts.

(d) The considerations just advanced entirely distinguish from the present case the decision of this court in the case of

Supervisors v. *Stanley*, 105 U. S., 305.

The facts in that case were as follows:

By the New York laws it was provided that

"If any person shall at any time before the assessors shall have completed their assessments make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, *after deducting his just debts*, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be

specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, *at the sum specified in such affidavit, and no more.*" (page 309.)

The state thereafter passed a statute for assessment *by the same assessors that made the general assessments* of the value of national bank stock; and it was held by the New York courts that this latter statute did not allow deductions of debts from the value of the stock. This court held the refusal of the right to have debts deducted from the value of national bank stock an unlawful discrimination against national bank stockholders, inasmuch as the right of deducting debts from the value of all personal property was accorded to others. The question then arose whether the entire act for taxation of national bank stock was unconstitutional, or only the particular provision forbidding deduction of debts; and the court sustained the law as a whole, though Justice Bradley dissented. (See, particularly, his dissenting opinion in the case of *Evansville Bank* v. *Brittan,* 105 U. S., 322, which was argued with the former case and followed it.) *But,* two things separate this decision from the case in hand, viz. (1) the same assessors assessed national bank stock and other property, and (2) the action of those assessors in deducting debts was purely ministerial because they had no discretion but to accept under the statute I have quoted the taxpayer's affidavit. The result of the fact that bank stock was assessed by the general assessors was that they had power under the general statute for deduction of debts from personal property (*which applied to those very assessors*) to act in the deduction of debts from the personal property

just as soon as the special prohibition in the statute for taxation of bank stock was taken out of the way; but in this case the assessment of railroads under Act 173 is made by the State Board of Assessment, while the assessment of other property is made by the local assessors, and though the local assessors are empowered *by the statutes which apply to them* to deduct debts from credits the State Board is not designated or empowered by any statute to act on that matter. It may be repeated that it does not lie with the court (though it say that railroad property cannot be assessed without deduction of debts from credits) to say what officers of the state can make such deduction. The statutes of Michigan have not conferred any such power on the members of the State Board of Assessment. Further, as already stated, the deduction of debts from credits in Michigan is an act of discretion--just as much, and in the same "*quasi*-judicial" way, as any act of assessment; while the deduction of debts from personal property under the New York law considered by this court was ministerial, because the statute made the affidavit of debts conclusive upon their existence.

On the point of the invalidity of the whole statute a like distinction with that stated concerning *Supervisors* v. *Stanley*, applies to *Citizens Street Ry. Co.* v. *Common Council*, 125 Mich., 673. The assessment of street railways, involved in that case, was made by the ordinary assessors; not by any official deriving his power to assess from, and having his functions measured solely by, the section of which a part was held unconstitutional. Indeed, the Michigan Supreme Court

did hold *all* of that portion of the section relating to assessment of the property of corporations in a peculiar way to be invalid because of the erroneous rule prescribed for deduction of debts from any personal property.

(See page 694 of the decision; and page 1196 of the Compiled Laws of 1897.)

This decision of the state court is an authority for the invalidity of the whole system of corporate taxation contained in Act 173, on account of the invalidity of that constituent of the system relating to credits.

(e) Before a court can uphold a statute of which part is unconstitutional, it must be able *clearly* to see that the legislature would have enacted that balance by itself. If there be room for reasonable doubt on that point, the whole law must fall; for the people are not to be put under statutes whose enactment is uncertain. The independence of the different parts of the statute must be made to appear affirmatively and satisfactorily. It cannot be asserted with any confidence, however, that the Michigan legislature would have adopted this average rate plan of taxing the property of railroads and of the other corporations therein enumerated with a further provision (not in the law), for deduction of debts from credits. Many of the taxpayers through the state with whose taxes the statute professes to seek a certain equality have no debts. Many more have no credits from which to deduct. These persons may well be the larger portion of the community. The legislature may well have thought that, *in view of the invariably large debts and credits,*

of railroads this provision was essential to the statute.

8. If the whole statute is void, of course any questions concerning the actual amount in which the credits of any company influenced its assessment, or of the amount in which debts ought to be deducted from the amount of that influence, are immaterial. The whole tax fails, without reference to any such questions. But if the entire law is not invalid, but in some strange way may stand (with the *addition* of a provision empowering the State Board of Assessments to deduct debts from credits), then it becomes pertinent to inquire—Is the entire *assessment* for 1902 of a company having both credits and debts invalid, or can the court sustain a part of the assessment (and consequently a part of the tax) after making corrections of it, by *itself* deducting the proper amount?

(a) The court has no power to do this. The assessing discretion (if anybody has it concerning this matter of deducting debts from credits) belongs to the State Board—not to the court.

(b) The data in the record are not sufficiently definite for ascertainment by the court of the amount that ought to be deducted from the assessment. The court cannot even tell how much the credits shown in the returns of the various companies to the State Board actually raised the assessment. They must be considered to have raised it somewhat; but how much is uncertain. *It will not do to assume that they raised the assessment only by their own full, face amount;* for it is unmistakable that the board did not make its assessments by the direct process of valuing each item of

property and adding those separate values together. On the contrary, the assessments were made chiefly by indirect processes, such as computations on the stock and bond price plan and computations on the basis of gross earnings and computations on the basis of net earnings. Take, for a single instance, the last method. If a company had credits of one hundred thousand dollars and debts of fifty thousand dollars, the net earnings would be increased by these facts one hundred thousand dollars, while they should have been increased only fifty thousand dollars. Here was an error of fifty thousand dollars in the net earnings. How much did that error affect the assessment? That depends upon how net earnings were capitalized. If at the rate of five per cent., the assessment was wrongly increased one million dollars. If the capitalization, however, was made at the rate of six per cent., the resulting error in the assessment was $833,333. This shows how impossible it is to eliminate from the assessment the error that resulted through failure to deduct debts. The same sort of uncertain error would inhere in the calculations on the basis of stock and bond prices, because they (on the theory of those who believe in such a method) represent the capitalized value of the company's earning power.

It follows, from the powerlessness of the court to correct the assessment (both because the assessing discretion does not belong to it, and because the state has not furnished the data for correction) that the whole assessment must be held invalid; and consequently the whole tax. This is the ground on which

the California Railroad Tax Cases were decided in this court.

Santa Clara County v. *Southern Pacific Ry. Co.*, 118 U. S., 394.

Thus far, the question of the discrimination between appellants and other taxpayers in Michigan as to credits has been treated altogether under the State Constitution. It has, however, a further importance under the Federal question of the "equal protection of the laws." In regular order, that aspect of the matter might have been treated earlier in this brief; but the discrimination is so palpable under the Michigan Constitution itself, and in that aspect is so amply demonstrated by the Michigan Supreme Court's decisions already cited, that the Federal view of the matter can best be considered after its treatment under Michigan's own law. What follows is in reference to the Federal side of the question.

The point was directly decided in the celebrated "California Railroad Tax Cases."

County of San Mateo v. *So. Pac. Ry. Co.*, 13 Fed., 145.

Railroad Tax Cases, 13 Fed., 722.

County of Santa Clara v. *So. Pac. Ry. Co.*, 18 Fed., 385.

The Constitution of California provided that, in the case of all but railroad property, mortgages should be deducted from the value of the mortgaged property, and the value of the equity only taxed to the owner of the mortgaged property; while in the case of railroads

whose property was under mortgage no such deduction should be made and the railroad should be assessed at the full value of the mortgaged property. It was this discrimination (as made, too, by the state constitution) that Justice Field and Judge Sawyer condemned. Justice Field said:

"The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as a basis for taxation, not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary value; as standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's property than upon the property of individuals similarly incumbered, or rather requires the assessor of the defendant's property, in estimating its value to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value. It is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage; and that the property of other parties, also having a mortgage upon it, shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner."

(13 Fed., on pages 737, 738.)

Further;

"If we assume that the mortgage in each case was a mere lien or incumbrance on the property affected, and not an interest in it, as the constitution declares it is,

then also is it clear that its elimination as an element in the valuation of the property of the defendants for taxation, while it was considered in the valuation of the property of natural persons, was a discrimination against the former, and led to unequal taxation against them. In neither view, therefore (that is, whether the mortgage were deemed as an interest belonging to another than the mortgagor, or as merely a lien upon the property of the mortgagor) was the assessment valid, and the taxation levied upon it cannot be sustained."

(18 Fed., on pages 401, 402.)

Again;

"The basis of all *ad valorem* taxation is necessarily the assessment of the property; that is, the estimate of its value. Whatever affects the value necessarily increases or diminishes the tax proportionately. If, therefore, any element which is taken into consideration in the valuation of the property of one party, be omitted in the valuation of the property of another, a discrimination is made against the one, and in favor of the other, which destroys the uniformity so essential to all just and equal taxation."

(18 Fed., 394.)

These California cases were taken on appeal to this court; but the decision here, while affirming the judgment below, rested upon the ground that the State Board of Assessment had included in the railroad assessment some property which the statute did not authorize them to assess, but left to assessment by the local assessors.

Santa Clara County v. *So. Pac. Ry. Co.*, 118 U. S., 394.

The same view as was adopted in these California Tax cases has been taken by the Missouri Supreme Court.

Russell v. *Croy*, 164 Mo., 69.

And the reasoning of Justice Field and Judge Sawyer is commended in—

Nashville, &c., Ry. v. Taylor, 86 Fed., 168, 179.

Fraser v. McConway & Torley Co., 82 Fed., 257.

Kingsley v. City of Merrill, 122 Wis., 185, 205.

As said in the statement preceding this brief, the questions arising through systematic under-assessment of property in Michigan by the local assessors will be found treated in the brief of Mr. Angell and Mr. Butterfield.

Respectfully submitted,

LLOYD W. BOWERS,
Of Counsel for Appellant.

O. E. BUTTERFIELD,
Solicitor for Appellant.

A. C. ANGELL,
HENRY RUSSEL,
ASHLEY POND,
BENTON HANCHETT,
Of Counsel.

APPENDIX A.

ACT NO. 173, MICHIGAN LAWS OF 1901.

An Act to provide for the assessment of the property of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight line companies; and for the levy of taxes thereon by a State Board of Assessors, and for the collection of such taxes.

The People of the State of Michigan enact:

Section 1. That the Board of State Tax Commissioners created under the laws of this State, shall ex officio constitute a State Board of Assessors, one of whom shall be elected chairman of said board.

Sec. 2. The secretary of the Board of State Tax Commissioners shall be ex officio secretary of the State Board of Assessors without extra compensation, and shall keep a record of all its proceedings in addition to such other duties as may be required of him by said board, and shall devote his whole time to the duties of his office. In addition to the secretary said board may employ such other clerical assistance as may be necessary and required to perform the duties imposed upon it by this act: *Provided,* That the compensation paid for such clerical assistance shall not in any case exceed one thousand dollars for each person employed, per annum: *Provided further,* That said board may employ such other assistance as may be necessary, with the consent of the Governor and the Board of State Auditors. The compensation of the said secretary and clerks, and all other necessary expenses incurred in carrying out the provisions of this act, shall be allowed by the Board of State Auditors upon proper vouchers approved by the chairman and secretary of the board, and paid by the State Treasurer out of the general fund.

Sec. 3. Said board shall have access to all books, papers, documents, statements and accounts, on file or

of record in any of the departments of State, subject to the rules and regulations of the respective departments relative to the care of public records. It shall have like access to all books, papers, documents, statements and accounts, on file or of record in counties, townships and municipalities. It shall have the right to subpoena witnesses, upon a subpoena signed by the chairman of said board and attested by the secretary thereof, delivered to such witnesses, which subpoenas may be served by any person authorized to serve subpoenas from courts of record in this State, and the attendance of witnesses may be compelled by attachment, to be issued by any circuit court in this State, upon proper showing that such witness has been properly subpoenaed, and has refused to obey such subpoena. The person appearing in response to such subpoena shall receive like compensation as is allowed by the statutes of this State to witnesses in the circuit court, to be allowed by the Board of State Auditors upon the presentation of a copy of such subpoena, with the number of days' service and mileage endorsed thereon and approved by a member of said Board or Assessors, or the secretary thereof. The person serving such subpoena shall receive the same compensation now allowed to sheriffs or other officers for serving subpoenas. Said board shall have power to examine witnesses under oath, said oath to be administered by any member of the board, or by the secretary thereof. It shall have the right to inspect and examine the books, papers or accounts of any corporation, firm or individual owning property to be assessed by said board, and if such corporation, firm or individual refuse to permit said inspection and examination, or neglect or fail to appear before said board in response to its subpoena, said corporation, firm or individual shall, for each such refusal, neglect or failure, forfeit the sum of five hundred dollars to the State, the sum so forfeited to be recovered in a proper action, brought in the name of the people of the State of Michigan, in any court of competent jurisdiction.

Sec. 4. It shall be the duty of said board to make an

annual assessment upon an assessment roll to be prepared by said board, of the property having a situs in this State as hereinafter defined, of railroad companies, union station and depot companies, express companies, doing business within this State, car loaning companies, and refrigerator and fast freight line companies, and all other corporations owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this State.

Sec. 5. The term property, as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, roadbed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switchboards, and all other property used in carrying on the business of said corporations or owned by them respectively, and all other real and personal property and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property: *Provided, however,* That this definition shall not include, apply to or subject to taxation such real estate as is owned and can be conveyed by such corporations under the laws of this State which is not actually occupied in the exercise of their franchises or in use in the proper operation of their roads or their corporate business; but such real estate so excepted shall be liable to taxation in the same manner and for the same purposes and to the same extent and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities in which the same may be situate. The term company, corporation or association, wherever used in this act, shall apply to and be construed as referring respectively to any railroad company, union station and depot company, express company, car loaning company or refrigerator or fast

freight line company, and any and all other corporations subject to taxation under this act. The term "property having a situs in this State," shall include all the property, real and personal, of the corporations enumerated in this act, owned, used and occupied by them within the limits of this State, and also such proportion of the rolling stock, cars and other property of such corporations as is used partly within and partly without this State, as herein provided to be determined.

Sec. 6. The several corporations enumerated in this act, doing business in this State, shall annually, between the first and thirtieth days of June in each year, under the oath of the president, secretary, treasurer, superintendent or chief officer of such company, make and file with the State Board of Assessors, in such form as said board may provide, upon blanks to be furnished by said board, a statement containing the following facts:

RAILROAD, UNION STATION AND DEPOT COMPANIES.

The blanks furnished to railroad and union station and depot companies, shall provide for the following information:

First. The name of the company;

Second. The nature of the company, and under the laws of what state or country organized;

Third. The location of its principal office;

Fourth. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager;

Fifth. The name and postoffice address of the chief officer or managing agent of the company in Michigan;

Sixth. The number of shares of capital stock;

Seventh. The par value and market value, or if there be no market value, the actual value, of the shares of stock on the second Monday of April of the year in which the report is made;

Eighth. A detailed statement of the real estate

owned by the company in Michigan, and where situate, and the value thereof;

Ninth. A detailed statement of the personal property, including moneys and credits owned by the company in Michigan, on the second Monday in April in the year in which the report is made, where situate, and the value thereof;

Tenth. The total value of the real estate owned by the company situate outside of Michigan;

Eleventh. The total value of the personal property of the company situate outside of Michigan;

Twelfth. The whole length of their lines, and the length of so much of their lines as is within or is without Michigan, which lines shall include what said railroad companies control and use as owners, lessees, or otherwise;

Thirteenth. A statement of the entire gross receipts of the companies, from whatever source derived, for the year ending the second Monday of April in the year for which the report is made;

Fourteenth. Such other facts and information as said board may require, in the form of the returns prescribed by it.

EXPRESS COMPANIES.

The blanks furnished to express companies shall provide for the following information;

First. The name of the company;

Second. The nature of the company and under the laws of what state or country organized;

Third. The location of its principal office;

Fourth. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager;

Fifth. The name and postoffice address of the chief officer or managing agent of the company in the State of Michigan;

Sixth. The number of shares of capital stock, (a) authorized, (b) issued;

Seventh. The par value and market value, or if there

be no market value, the actual value of the shares of stock, together with the total amount of bonded indebtedness, on the second Monday of April of the year for which the report is made;

Eighth. The situation, income and value in detail of its real estate in this State;

Ninth. The total income from and cash value of all its real estate situated outside of this State;

Tenth. A full and correct inventory, at the true cash value, of its personal property, including moneys and credits, within this State;

Eleventh. The true cash value of all its personal property including money and credits without this State.

Twelfth. The whole length and names of railroad lines and water and stage routes over which it did business, and separately, in detail, the portions of such lines and routes within this State, and the portion of such routes over navigable waters of the United States within this State;

Thirteenth. Such other facts and information as may be deemed necessary by the State Board of Assessors, or any member thereof, to the proper assessment of the property of such company.

CAR LOANING, STOCK CAR, REFRIGERATOR AND FAST FREIGHT LINE COMPANIES, AND OTHER CAR COMPANIES.

The blanks furnished to car loaning, stock car, refrigerator and fact freight line companies shall provide for the following information:

First. The corporate name of the company;

Second. The nature of the business of said company, and under the laws of what State or country organized;

Third. The location of its principal office;

Fourth. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager;

Fifth. The location of its principal office in the State of Michigan, together with the name and ad-

dress of the chief officer or managing agent of the company in Michigan;

Sixth. The total number of cars and rolling stock of any such corporation run over or operated upon any line or lines of railroad within this State each day during the entire year preceding the date of making and filing such report;

Seventh. The cost of construction of each of said cars;

Eighth. The length of time the same has been in service;

Ninth. The cash value of each of said cars so operated and run in this State, at the time of making and filing such report;

Tenth. And such other and additional information as may be deemed necessary by said board, or any member thereof, to the proper assessment of the cars of such company in this State in accordance with the provisions of this act and to the performance of the duties imposed upon it hereby.

Sec. 7. Blanks for making the statements provided for in section six shall be furnished to such companies on making application to said board: *Provided*, That the reports hereby provided for shall not in any way relieve any of said companies from making the reports now required to be made to other State officers. In case any company fails or refuses to make the statement required by this act, or refuses to furnish any information requested, the board shall inform itself as best it may on the matter necessary to be known, in order to discharge its duties with respect to the assessment of the property of such company. Any company which shall refuse or neglect to make the report required by this act within the time specified, shall be subject to a penalty of five hundred dollars for each day of the continuance of such neglect or refusal to file said report, to be recovered in a proper action brought in the name of the people of the State of Michigan in any court of competent jurisdiction.

Sec. 8. Subsequent to the filing of the reports required in the preceding section, and prior to the fifteenth day of December in each year, it shall be the

duty of the said State Board of Assessors, to prepare an assessment roll, as provided in section four of this act, upon which they shall assess at the true cash value on the second Monday of April of the year in which the assessment is made, all the property of the companies herein enumerated subject to taxation under this act, which said assessments shall not be final until reviewed as hereinafter provided. For the purpose of arriving at the amount and character and the true cash value of the property belonging to said companies as appearing upon the assessment roll for the purpose of assessment and taxation, the said board may personally inspect the property belonging to said companies, and may take into consideration the reports filed under this act, the reports and returns of such companies filed in the office of any officer of this State, and such other evidence as may be obtainable bearing thereon. In determining the true cash value of the property of railroad and union station and depot companies which own, lease or operate lines partly within and partly without this State, the said board shall be guided, in ascertaining the property subject to taxation in Michigan, by the relation which the number of miles of main track within the State of Michigan bears to the entire mileage of the main track of said companies both within and without this State. In determining the cash value of the property of express companies, they shall ascertain and determine the actual value in money of the entire amount of the capital stock and bonded indebtedness of such express company. From the amount so obtained and determined, said board shall deduct the actual value of all real estate owned by it as ascertained by said board, and the actual value of all its personal property which is not used in the express business of such express company. And the remainder thus obtained shall be used in determining the assessment of such express company in the following manner: The said board shall then divide the amount as obtained above by the total number of miles of railroad, stage, water and other routes over which the company did busi-

ness, to obtain the value per mile, and shall then multiply the value per mile thus obtained by the total number of miles of such routes within this State, exclusive, however, of the number of miles of water routes over the navigable waters of the United States within this State, to which result shall be added the value of all real estate owned by such express company in this State, as determined by said board, and the sum so obtained shall be taken and considered as the actual value of the property of such express company subject to assessment and taxation in this State. In ascertaining the cash value of the property of car loaning, stock car, refrigerator, fast freight line and other car companies subject to taxation under this act, they shall ascertain the average number of cars used in this State during the year preceding the date of the filing of the report mentioned in the preceding section, such average to be determined by dividing the total number of cars so used or operated within this State during said year by the total number of days on which said cars were so used or operated within this State; and they shall also ascertain the average cash value of such average number of cars, and from said data the total valuation shall be determined and shall be the assessment against the property of said corporation.

Sec. 9. Upon said assessment roll, after the names of each of the companies assessed thereon, shall be placed a general description of the properties of said companies, which shall be deemed to include all of the properties of said companies liable to taxation under this act. In the case of railroad, union station and depot companies such general description may be as follows: "Real estate, rolling stock, right of way and appurtenances thereto, and all other property used in carrying on the corporate business and subject to taxation by a State Board of Assessors." In the case of car loaning, stock car, refrigerator and fast freight line and other car companies, the following general description may be used: "Cars subject to taxation by a State Board of Assessors." In the case

of express companies, the following general description may be used: "Property subject to taxation by a State Board of Assessors." In an appropriate column opposite the names of said corporations shall be extended the cash valuations of the properties of said companies so assessed.

Sec. 10. On the third Monday of December in each year, it shall be the duty of the State Board of Assessors to meet at the State capitol at Lansing, and to continue in session from day to day for so long a period as may be necessary, not later than the fifteenth day of January next thereafter, for the purpose of reviewing said assessment roll, and any company or person interested shall have the right to appear during said period and be heard as to the valuation of the property of any company, and said State Board of Assessors may, on such application or on its own motion, correct the assessment or valuation of the property of such company in such manner as will, in its judgment, make the valuation thereof just and equal; and for the purpose of arriving at the true cash value of the properties assessed on said assessment roll, may subpoena witnesses as provided in section three of this act and have such hearing as may be deemed necessary. In case it shall appear or be made to appear to the members of said board, acting in review for assessment purposes, that the property of any corporation subject to taxation under the provisions of this act shall have been omitted from said assessment roll, it shall place the same thereon and make the assessment thereof as required in sections eight and nine of this act: *Provided,* That any such assessment shall take place in time to allow five full days for the review of the same before the expiration of the time herein provided for the completion of the review. After said State Board of Assessors shall have completed the review of said rolls as herein provided, they shall place opposite each description of property in said roll, in a column provided for that purpose, the true cash value of the same as ascertained and determined by them, and such valuation so fixed by them shall be the final valua-

tion upon which the tax upon said property shall be levied and spread as herein provided. After said board shall have completed the review of said roll, a majority thereof shall certify under their hands officially, and spread on said roll, a certificate to the effect that the same has been acted upon and reviewed in accordance with law, which certificate shall state all the alterations, changes, corrections and additions made in or to the assessment or valuation of the property appearing on said roll.

Sec. 11. It shall be the duty of the county clerk in each county in this State, as soon as possible after the equalization of the board of supervisors of his county of the assessment rolls of the several municipalities therein, and not later than the first day of November in each year, to make a report, duly certified, to the State Board of Assessors, of the record of such equalization and of the record required to be made under section thirty-seven of the general tax law, being section three thousand eight hundred sixty of the compiled laws of eighteen hundred ninety-seven, as appears upon the records of such board of supervisors, which report shall, among other things, contain a statement of the amount of ad valorem taxes to be raised in the several municipalities of such county for State, county, municipal, township, school and other purposes, and a statement of the aggregate valuation of the property in each of said several municipalities, as taken from the assessment rolls of said municipalities for the year in which such equalization is made. It shall be the duty of the supervisor or other assessing officer of cities and villages in this State governed by special charters, which provide for the collection of ad valorem taxes, which are not reported to the board of supervisors for the purposes of equalization or review, and the supervisors or other assessing officers of cities organized under general laws, to make, within the time above limited, a properly certified report to the State Board of Assessors of all ad valorem taxes raised in any of said municipalities, which have not been reported to the board of supervisors for the purposes of equalization

and review. In case any county clerk or any supervisor or assessing officer shall neglect or fail to make the report by this section required, within the time limited, the said State Board of Assessors shall inspect and examine, or cause an inspection and examination of the records of said board of supervisors, or in cities affected by this section, an examination of the records of the proper officer, for the purpose of procuring the information required for the purpose of arriving at the average rate of taxation in this State; and the said board, in addition thereto, may require such reports on blanks which it shall prepare and furnish therefor, from all county, State and municipal officers, as it shall deem necessary to the accomplishment of the purpose of this act. Any county clerk, supervisor, or assessing officer who shall fail to make the report required by this section shall be subject to a penalty of one hundred dollars, to be recovered in a proper action in the name of the people of the State of Michigan, in any court of competent jurisdiction.

Sec. 12. As soon as the reports required by the preceding section to be filed have been filed, or the information therein required to be procured shall have been procured, and not later than the fifteenth day of December in each year, the said State Board of Assessors shall ascertain and determine the average rate of taxation for the then current year levied upon other property upon which ad valorem taxes are assessed for State, county, township, school and municipal purposes, and shall enter the same upon its records forthwith, together with the method by which such average rate was ascertained and determined.

Sec. 13. Said board shall tax the property of the several companies as assessed by it at the rate as determined by it, and the amount of tax to be paid by each of said companies shall be extended upon said assessment roll opposite the descriptions of their respective properties. After the completion of said tax roll, and prior to the first day of February in each year, the said board shall attach thereto a certificate signed by the members of the board, or a majority

thereof, which shall be as follows: "We do hereby certify that we have set down in the above assessment roll all the property of railroad companies, express companies, union station and depot companies, car loaning, stock car, refrigerator and fast freight line and other car companies liable to be taxed in this State, according to our best information, and that we have estimated the same at what we believe to be the true cash value thereof, and that we have assessed the taxes thereon at the average rate of taxes for State, county, township, school, municipal and other purposes, levied through the State during the present year, as determined by us. The said tax roll shall thereupon be forthwith delivered to the Auditor General, who shall immediately notify by registered mail the several companies taxed thereon to pay the taxes extended thereon to the State Treasurer. The said taxes shall be payable on the first day of March following the assessment and levy thereof, and shall be in lieu of all taxes for State and local purposes, not including special assessments on property particularly benefited, made in any county, city, village or township. All taxes not paid before the first day of April in the year in which the same are payable shall bear interest at the rate of one per cent. per month thereafter. The taxes so extended against said companies shall become forthwith a debt due from each of said companies to the State, and shall constitute a lien upon all the property of said companies, real, personal and mixed, from the time of the extension until the payment thereof, which lien shall take precedence of all demands, judgments, assignments by warranty deed or otherwise, or decrees against said companies, which lien and debt may be enforced by seizure or sale of said property or such portion thereof as may be necessary to satisfy the same, as hereinbefore provided. The State Board of Assessors shall, upon the completion of said roll and the correction hereinbefore provided for, annex to said roll a warrant, signed by the State Board, or a majority of them, commanding the Auditor General to collect the several sums mentioned in the last column of such roll, and being the sum for which the

said company was assessed and was liable to pay for a tax upon its property under the provisions of this act for the purposes provided for in this act; and the said warrant shall authorize and command the Auditor General, in case any corporation named in the assessment roll shall neglect or refuse to pay its tax, to levy the same by distress and sale of the properties of said corporation, or such portion thereof as shall be necessary to raise sufficient money to satisfy said tax and the expense of said sale, after giving the same notice of such sale as provided for in the general laws of this State for the sale of property seized for taxes and offered for sale: *Provided,* He may bring an action in the name of the people of the State of Michigan in any court of competent jurisdiction in the State of Michigan, or in any other state, for the enforcement of said lien, and upon recovery of judgment or decree therein the same may be collected by execution, levy and sale, as in other cases, upon judgments in courts of record.

Sec. 14. If any court of competent jurisdiction shall adjudge that any tax levied under the provisions of this act is illegal on account of any irregularity or informality in the determination of the average rate of taxation required to be ascertained and determined by said State Board of Assessors, or for the reason that such average rate has not been ascertained and determined according to law, it shall be the duty of the said State Board of Assessors, whether any part of the taxes assessed and levied have been paid or not, to redetermine and reascertain the average rate of taxation throughout the State in accordance with law, and when such redetermination and reascertainment has been had, to make a duplicate of the original assessment roll and to extend the taxes thereon according to such redetermined and reascertained average rate, and when such duplicate roll has been made and the taxes extended thereon in the manner provided in this section, it shall be of the same force and effect as an original assessment made in accordance with law. All proceedings on the redetermination and reascertainment of such average rate and for the exten-

sion and collection of taxes upon said duplicate assessment roll shall be conducted in the method originally provided for, so far as may be. Whenever any sum or part thereof levied upon any property subject to taxation under this act so set aside has been paid and not refunded, the payment so made shall be applied upon the reassessment upon said property, and the reassessment to that extent shall be deemed to be satisfied.

Sec. 15. No tax assessed upon any property and no average rate determined by said State Board of Assessors as hereinbefore required, shall be held invalid by any court of this State on account of any irregularity in any assessment or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of the property having been assessed without the name of the owner, or in the name of any corporation or person other than the owner, or on account of any other irregularity, informality or omission, if the method and manner of ascertaining and determining the average rate of taxation on property in this State is in accordance with the constitution and statutes of this State.

Sec. 16. All taxes collected under this act shall be applied in paying the interest upon the primary school, university and other educational funds, and the interest and principal of the State debt, in the order herein recited, until the extinguishment of the State debt other than the amounts due to educational funds, when such taxes shall be added to and constitute a part of the primary school interest fund; and such taxes as are collected under the provisions of this act shall be treated and disbursed as specific taxes are now treated and disbursed: *Provided, however,* That if any of the corporations, companies or associations herein named were not paying specific taxes to this State on November sixth, A. D. nineteen hundred, the tax collected from such corporations, companies or associations under this act shall be paid into and become a part of the general fund of the State.

Sec. 17. The first assessment under this act shall be

made as herein required in the year nineteen hundred and two. Nothing herein contained shall be deemed a waiver or affect the collection of the specific taxes required to be paid by the companies hereby affected, on the first day of July in the year nineteen hundred and one, and on the first day of July in the year nineteen hundred and two, under the general laws upon the property or business of such companies operated within this State. The existing laws providing for the collection of such specific taxes shall be continued in force until the collection and payment of all taxes levied thereunder for the year nineteen hundred and one and previous years.

Sec. 18. If said board shall wilfully assess any property at more or less than what the members taking part in making such assessment believe to be its true cash value, the members voting in favor of such assessment shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding five thousand dollars each.

Sec. 19. If any person, company, association or corporation whose property is subject to assessment under this act shall directly or indirectly promise, offer or give to any member of said board, during his term of office, or to any other person at his request, any gratuity of any kind whatever, such person or corporation shall forfeit to the State the sum of ten thousand dollars for each such offense, to be recovered in an action in the name of the people of the State of Michigan, in any court of competent jurisdiction. And the recovery of such fine under this act shall not constitute a bar to any prosecution of the person or corporation so offending under the criminal laws of this State.

Sec. 20. All other acts or parts of acts, whether contained in any acts for the incorporation of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight line companies, or in any other law of this State, so far as such acts or parts of acts are inconsistent with

this act, and no further, are hereby repealed, except as herein expressly stated: *Provided, however,* That all rights which the State now has under any of said acts, for taxes or penalties, shall not in any way be affected by this act, and shall not constitute a bar to any prosecution or recovery on account of such taxes or penalties.

Approved May 27, 1901.

APPENDIX B.

MICHIGAN CONSTITUTIONAL PROVISIONS.

(In form previous to amendment of 1900.)

ARTICLE XIV.

Section 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank road and other corporations hereafter created.

Section 11. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

Section 12. All assessments hereafter authorized shall be on property at its cash value.

Section 13. The legislature shall provide for an equalization by a state board in the year one thousand eight hundred and fifty-one, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes.

Section 14. Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

(In form after the amendment of 1900.)

ARTICLE XIV.

Sec. 10. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value, by a State Board of Assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November sixth, A. D. nineteen hundred, shall be applied as provided for specific State taxes in section one of this article.

Sec. 11. The legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: *Provided,* That the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the rate of taxation on such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for State, county, township, school and municipal purposes.

Sec. 13. In the year one thousand nine hundred and one, and every fifth year thereafter, and at such other times as the legislature may direct, the legislature shall provide for an equalization of assessments by a State Board, on all taxable property, except that taxed under laws passed pursuant to section ten of this article.